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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 173.

DULUTH AND IRON RANGE RAILROAD COMPANY,

Plaintiff in Error.

vs.

THE COUNTY OF ST. LOUIS,

Defendant in Error.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The lands in question on which taxes were levied are swamp lands, and were granted to the State of Minnesota by act of Congress of March 12, 1860,

extending the swamp land grant of Arkansas to the State of Minnesota.

12 U. S. Statutes at Large, page 3. See Appendix "A."

9 U. S. Statutes at Large, page 519. See Appendix "B."

These lands are situated in the counties of St. Louis, Lake and Cook, and were granted to the Duluth & Iron Range Railroad Company by the act of March 9, 1875. Special Laws of 1875, p. 286. See Appendix "C."

This act in substance granted ten sections per mile for the construction of a railroad from Duluth to what is now the village of Tower and to the iron mines, and contained the following provision:

"Provided that none of the lands hereby granted shall be subject to taxation until the expiration of five years from the issuance of the patent by the state unless previously sold or disposed of by said railroad company."

The court found that the railroad company accepted this act, constructed its line of road and completed the same, on or about the 20th of December, 1886; that the said road was examined by commissioners appointed by the state, who filed their report; that the railroad company from time to time selected the land, and that within five years from the second of May, 1897, at the time these lands were taxed, the state conveyed the lands involved in this case to the railroad company, so that the five years had not elapsed at the time the lands were taxed.

The court further found—folio 111, Record—that on the 16th of May, 1884, the board of directors of the railroad company by resolution accepted the provisions of the act of March 10, 1873, entitled "An Act providing for the collection of taxes from the St. Paul, Stillwater & Taylors Falls Railroad Company," and other railroad companies, commonly known as the gross earnings tax law.

Special Laws 1873, Chap. 111, p. 302.

This act provided as follows:

Sec. 1. "In consideration of an annual payment of a percentum, as provided in this section, by the St. Paul, Stillwater and Taylor's Falls Railroad Company, the railroad, its appurtenances and appendages, and all other property, estate and effects of said corporation, held or used for, in or about the construction, equipment renewal, repair, maintaining or operating its railroad, including the lands granted to said company to aid in the construction of said railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all taxation and from all assessments; and in consideration of the grants made to and the privileges conferred upon the said company, and the exemption contained in this section, the said company shall during the first three years from and after January 1, 1872, on or before the first day of March of each and every year, pay into the treasury of this state one per cent. on the gross earnings of said railroad, the first payment to be made on the first day of March, one thousand eight hundred and seventy-three, or within fifteen days after the passage of this act; and shall, during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of the state, on or before the first day of March, of each year and every year, two per cent on the gross earnings of said railroad; and shall from and after

the expiration of ten years from the said first day of January, one thousand eight hundred and seventy-two, on or before the first day of March of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad; and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this state on or before the first day of February in each year, the truth of which abstract shall be verified by affidavits of the treasurer and secretary of said company; and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the governor of this state, or any other person appointed by law prescribed to examine under oath, the officers and employees of said company or other persons; and if any person so examined by the governor or other authorized person shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the state the payment of aforesaid per centums, it is hereby declared that the state shall have a lien upon the railroad of said company, and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall have and take precedence of all demands, decrees and judgments against said company: provided, that the lands of said company shall be subject to taxation as soon as sold, leased, or contracted to be sold or leased.

Sec. 2. "Any railroad company owning or operating or which may hereafter own or operate, any line or lines of railroad in this state, may, by resolution of its board of directors, attested by its secretary and filed with the secretary of state, accept and become subject to the provisions of this act; and in such case the payment of such percentage in lieu

of taxes, in accordance therewith, shall commence from and after the first day of March, next after the date of the completion of thirty miles of such line hereafter built, or of the entire line, if the same shall be less than thirty miles in length."

In State v. Northern Pacific Railroad Company, 36 Minn. 207, the Supreme Court held that whenever the foregoing act was accepted by any other railroad company, it was bound to pay one per cent for three years next after the first thirty miles of its line was completed; two per cent for the next seven years, and three per cent thereafter. The court said:

"This is in accordance with a policy which has been so generally adopted with respect to the railroad system of the state, and had been when the act of 1873 was passed, that it affords reason in support of the construction which is by far the most natural from the letter of the act itself."

The court found that since the acceptance of said act the railroad company has annually paid to the state of Minnesota the gross earnings tax provided by said act.

On March 19, 1895, Laws of 1895, p. 378, the legislature passed the law, the validity of which is involved in this case. So much thereof as is necessary to the decision of the question at bar, is as follows:

"Section 1. All lands in this state heretofore or hereafter granted by the state of Minnesota or the United States, or the territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used or occupied for right of way, gravel pits, sidetracks, depots and all

buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies.

"Provided that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as now provided by law. And that nothing in this act contained shall be construed to repeal said laws except in so far as the same relate to the tax upon said lands."

"Sec. 2. Such portion or portions of any act or acts, general or special, of the state or territory of Minnesota heretofore enacted, which provides or attempts to provide for any exemption of lands hereby declared taxable, from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed."

"Sec. 3. If this act shall be held to be void so far as it applies to the lands of any particular railroad company in this state, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated."

Under this law, the officers of St. Louis County assessed these lands for taxes in addition to the gross earnings tax. The railroad company refused to pay them; and, pursuant to the statute of Minnesota by which delinquent taxes were enforced, proceedings were commenced by the Auditor's filing a list of the delinquent taxes with the Clerk of the District Court where the lands were situated. This, under the statute, is the commencement of a suit. The railroad company filed its answer, setting up the five years' exemption in the act granting the lands, and the contract contained in the Taylor's

Falls act. In substance, it answered that the law of 1895 impaired the obligation of the contract between the state and the railroad company contained in its grant of lands and contained in the grant of the legislature whereby the railroad company agreed to pay a gross earnings tax on the condition of being forever exempted from any other taxation or assessment. The District Court of St. Louis County made findings of fact. Record, pages 51 to 55 inclusive. It held the law of 1895 valid, and ordered judgment against the railroad company for the taxes. Record, pages 55 to 57. From this judgment the railroad company appealed to the highest court of the state, where the judgment was affirmed on the authority of State ex rel Marr v. Stearns County, 72 Minn. page 200, which case is now pending before this court for re-argument. The opinion will be found on pages 60 and 61 of the record. From this judgment the Duluth & Iron Range Railroad Company prosecuted a writ of error to this court. The assignments of error will be found on pages 27 to 28 of the record. These assignments may be considered under one head, and are in substance that the Supreme Court of Minnesota erred in holding the act of March 9, 1895, taxing the lands in question, valid, and deciding against the claim of plaintiff in error that the said law impaired the obligation of its contract with the state.

ARGUMENT.

I.

A QUESTION OF IMPAIRMENT OF THE OBLIGATION OF A CONTRACT BRINGS WITH IT INTO THIS COURT THE SUBSIDIARY QUESTION AS TO THE EXISTENCE OF A VALID CONTRACT; AND IN DETERMINING THE LATTER QUESTION, IT IS WELL SETTLED THAT THIS COURT WILL NOT CONSIDER ITSELF BOUND BY THE DECISIONS OF THE COURTS OF THE STATE FROM WHICH THE ACTION IS BROUGHT, EVEN THOUGH SUCH DECISIONS MAY INVOLVE THE INTERPRETATION OF THE CONSTITUTION AND LAWS OF THAT STATE.

University v. The People, 99 U. S. 309, 323.
Mobile & Ohio R. R. Co. v. Tennessee, 153 U. S. 486, 492 to 493.
McCollough v. Virginia, 172 U. S. 109.
Houston & Texas Central R'y. v. Texas, 177 U. S. 77.

II.

ANOTHER PROPOSITION EQUALLY WELL SETTLED, IS THAT UNLESS RESTRAINED BY SOME PROVISION OF THE CONSTITUTION, THE POWER OF THE STATE IS UNLIMITED TO MAKE A PERPETUAL CONTRACT FOR A COMMUTED SYSTEM OF TAXATION.

Fletcher v. Peck, 6 Cranch, 87.
State of New Jersey v. Wilson, 7 Cranch, 164.

Jefferson Branch Bank v. Skelly, 1 Black, 436.
Farrington v. Tennessee, 95 U. S. 679.
McGee v. Mathis, 4 Wallace, 143.
Asylum v. New Orleans, 105 U. S. 362.
New Jersey v. Yard, 95 U. S. 104.
Gordon v. Appeal Tax Court, 3 Howard, 133.
Von Hoffman v. City of Quincy, 4 Wallace, 535.
Chicago v. Sheldon, 9 Wallace, 50.
Wilmington Railroad v. Reid, 13 Wallace, 264.
Humphrey v. Pegues, 16 Wallace, 244.
Mobile & Ohio R. R. Co. v. Tennessee, 153 U. S. 486.
Pearsall v. Great Northern Ry., 161 U. S. 662.

This has also been the universal course of decision in the Supreme Court of Minnesota:

First Division v. Parcher, 14 Minn. 297.
State v. Winona & St. Peter R. R. Co., 21 Minn. 315.
C. M. & St. Paul Railroad Co. v. Pfaender, 23 Minn. 217.
City of St. Paul v. St. Paul & Sioux City R. R. Co., 23 Minn. 469.
County of Stevens v. St. Paul, M. & M. R. R. Co., 36 Minn. 467.
State v. Luther, 56 Minn. 156.
State v. Stearns, 72 Minn. 200.
Traverse Co. v. St. Paul, M. & M. R. R. Co., 73 Minn. 417.

III.

DID THE RAILROAD COMPANY HAVE A VALID CONTRACT OF EXEMPTION FOR FIVE YEARS BY THE ACT GRANTING THE LANDS, AND THEREAFTER, BY AN ACCEPTANCE OF THE TAYLOR'S FALLS CHARTER, WAS A PERPETUAL CONTRACT FOR A COMMUTED SYSTEM OF TAXATION ENTERED INTO WHICH THE STATE IS INHIBITED FROM IMPAIRING?

In 1875, when the grant of lands was made, the legislature in the act making the grant exempted the lands for a term of five years after they should be conveyed to the railroad company. Of course it was not then known whether the railroad company would accept the provisions of the Taylor's Falls act; but in 1884, it did accept this act. The two acts do not conflict—the first being a specific exemption for five years, and the second a contract for a commuted system of taxation. If either act is valid, this judgment was erroneous. It would seem, therefore, best to consider these questions in the following order:

a. Did the constitution of 1858 prohibit the state from contracting for a perpetual system of gross earnings tax in lieu of other taxation?

b. Did the Taylor's Falls act and the acceptance thereof by the Duluth & Iron Range Railroad constitute a contract which the state is inhibited from impairing?

c. Was there a valid exemption for the term of five years from the time the lands were conveyed by patent from the state to the Railroad Company?

A.

DID THE CONSTITUTION OF 1858 PROHIBIT THE STATE FROM CONTRACTING FOR A PERPETUAL SYSTEM OF GROSS EARNINGS TAX IN LIEU OF OTHER TAXATION?

The answer to this question depends upon the construction of Sections 1 and 3, of Article 9, of the Constitution of Minnesota adopted in 1858. These sections read as follows:

"Section 1. All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state."

"Section 3. Laws shall be passed taxing all moneys, credits, investments and bonds, stocks, joint stock companies or otherwise, and also all real and personal property according to its true value in money."

The constitution then provides for certain exemptions which are not important to the question involved.

To understand what the constitutional convention and the people intended by the adoption of these provisions of the constitution, it will be necessary for us to familiarize ourselves with the legislative history of the territory on the subject of taxation of railroads—with the undeveloped condition of the territory and the objects to be attained by granting these charters and contracts, for these provisions are to be considered in the light of the public policy entertained and the purposes sought to be accomplished at the time they were

made, rather than in the light of the present time when different ideas and theories may prevail.

As further bearing upon this interpretation we have a right to consider the uniform legislative, executive and judicial construction placed upon the constitution after its adoption. It is well settled that these are the principles by which the constitutional and legislative provisions should be interpretated.

State ex rel Getchell v. O'Connor, Supreme Court of Minnesota, 83 N. W. 498.

Holy Trinity Church v. United States, 143 U. S. 459.

United States v. Union Pacific R. R., 91 U. S. 79.

Croomes v. States, 51 S. W. 927.

State v. Parler, 29 S. E. 654.

Butterick Publishing Co. v. Bailey, 75 N. W. 189.

Collins v. New Hampshire, 171 U. S. 34.

United States v. Wong Kin Ark., 169 U. S. 653.

Troy & M. Co. v. City of Denver, 53 Pac. Rep. 257.

People of the State of New York ex rel Attorney General, v. the Utica Insurance Co., 15 Johnson, 365.

Delafield v. Brady, 108 N. Y. 529.

Singer Mfg. Co. v. M'Collock, 24 Fed. 667.

In the case of State ex rel Getchell v. O'Connor, the Supreme Court had under consideration an

amendment to the constitution providing as follows:

"Any city or village in this state may frame a charter for its own government," etc.

It was held construing the history of the legislation in relation to charters that this applied only to cities incorporated prior to the adoption of the constitutional provision. The court said:

"In determining the intended amendment reference may be had to the conditions surrounding the government of municipalities and the history of general legislation with respect thereto."

In the case of Holy Trinity Church v. United States, 143 U. S. 459, the court says:

"It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers. This has been often asserted and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in Plowden, 205: 'from which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions

have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances."

In the case of United States v. Union Pacific Railroad, 91 U. S. 79, the court says:

"In construing an act of congress we are not at liberty to recur to the views of individual members in debate nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of congress, and this is to be ascertained from the language used. But courts, in construing a statute may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. Aldridge v. Williams, 3 Howard, 24; Preston v. Browder, 1 Wheaton, 120.

"Many of the provisions of the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed."

A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the maker.

In the case of Croomes v. State, 51 S. W., page 927, the court says:

"When it is plainly perceivable that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that in-

tention will be enforced and carried out and made to control the strict letter," citing Black's Interpretation Laws, page 73.

"In the case of State v. Parler, 29 S. E., page 654, the court says:

"It has been suggested at the bar that a resort to contemporaneous construction by the legislature will show what the constitution means. While this is not recognized as of much value except in cases of doubtful construction, yet it is admitted as one of the means to ascertain the meaning of doubtful terms.

"This is of value, too, because many of the members of the convention which framed the constitution were also members of the next general assembly, which assembled in little less than one month after the constitution went into effect."

In the case of Collins v. New Hampshire, 171 U. S., page 34, the court says:

"In whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect."

"In the case of United States v. Wong Kin Ark., 169 U. S., page 653, the court says:

"In construing any act of legislation, whether a statute enacted by the legislature or a constitution established by the people as the supreme law of the land, regard is to be had not only to all parts of the act itself, and of any former of the same law-making power, of which the act in question is an amendment, but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted."

IN ORDER TO SHOW THIS LEGISLATIVE, EXECUTIVE AND JUDICIAL INTERPRETATION OF THE CONSTITUTION AND THE UNIFORM POLICY OF THE STATE AS TO TAXATION OF RAILROADS, WE WILL GIVE A SYNOPSIS OF EACH SEPARATE RAILROAD CHARTER OR GRANT OF COMMUTED TAXATION SINCE THE ORGANIZATION OF THE TERRITORY.

Minnesota & Northwestern Railroad, now Chicago Great Western.

The first one was "An Act to incorporate the Minnesota and Northwestern Railroad Company," March 4, 1854, Laws of 1854, page 121, Chapter 47.

Section 8 of this provided for paying to the state seven per cent of the gross earnings whenever the net earnings of the road should exceed twenty per cent.

On March 1, 1856, this provision of taxation was amended so as to make it forever thereafter two per cent upon the gross earnings.

Laws of 1856, Chapter 47, page 76.

This two per cent was given in lieu of a land grant which was taken away from the company and conferred upon another company. All other companies in this state pay three per cent.

Congress on June 29, 1854, had granted to the territory of Minnesota certain lands to aid in the construction of this road. Subsequently Congress repealed this, and the grant was conferred upon the Minnesota Central Railroad Company.

The validity of this repealing act came before the Supreme Court of Minnesota.

See United States of America v. Minnesota & Northwestern R. R. Co., 1 Minn. 127.

The court held that the repeal was unconstitutional, and said:

"An interest in or right to lands, franchises, etc., once vested cannot be divested by any act of the grantor, unless by agreement of the parties to the grant.

"Every grant of a franchise (says Judge Story) is necessarily exclusive, so far as the grant extends, and cannot be resumed or interfered with. The legislature cannot recall its grant nor destroy it. In this respect, the grant of a franchise does not differ from a grant of lands. In each case the particular franchise or particular land is withdrawn from legislative operation, and the subject matter has passed from the hands of the government."

It will be noted here that at an early day in the history of the territory, before the adoption of the constitution, the Supreme Court of the territory had held that the legislature cannot recall its grant or destroy it, and that this grant of lands was the same as a grant for a franchise, exemption, or any other grant which the legislature makes. This was the pioneer case in Minnesota, and in making these territorial grants the courts, the legislature and the people well knew and intended them to be perpetual and irrevocable grants.

Minnesota & Pacific Railroad Company, and Successor Railroad Corporations.

A brief history of the Minnesota & Pacific Rail-

road Company and its successor corporations, and of the land grants made to them, will be necessary.

On March 3, 1857, Congress made a grant of lands to the territory of Minnesota for the purpose of aiding in the construction of various railroads.

11 U. S. Statutes at Large, page 195.

This grant was for six sections per mile, and constituted the government land grant to the Minnesota & Pacific, subsequently the St. Paul & Pacific; St. Paul, Minneapolis & Manitoba, now Great Northern; The Transit Railroad Company, now the Winona & St. Peter; The Root River Valley and Southern Minnesota, now the Chicago, Milwaukee & St. Paul; the St. Paul & Sioux City, now the Chicago, St. Paul, Minneapolis & Omaha; the Minneapolis & Cedar Valley Railroad Co., now the Iowa & Minnesota Division of the Chicago, Milwaukee & St. Paul; the St. Paul & Chicago Railroad Co., now the River Division of the Chicago, Milwaukee & St. Paul.

By act of the legislature of the territory of Minnesota, Laws of 1857, Chapter 1, the Minnesota & Pacific Co. was incorporated, and a part of its grant of lands conferred upon it.

By Section 18, Chapter 1, it was provided as follows:

"Sec. 18. In consideration of the grants, privileges and franchises herein conferred on the said Minnesota and Pacific Railroad Company, the said company shall and will, on or before the first day of March in each year, pay into the treasury of the territory or future state, three per centum of the gross earnings of the said railroad, for the year

ending on the last day of the preceding December, in lieu of all taxes and assessments whatever; and for the purpose of ascertaining the said earnings an accurate account shall be kept by said company of all receipts and expenditures on account of the operation of said railroads, and abstracts thereof, shall be furnished by said company to the treasurer of the Territory or State, on or before the first day of February in each year, the truth of which shall be verified by the affidavits of the secretary and treasurer of said company; and for the purpose of ascertaining the truth of said affidavits, and the correctness of such abstracts full power is vested in the Governor, or any other person appointed as may be by law prescribed, to examine the books and papers of said company, and to examine under oath the officers, agents and employes of said company, and other persons, and if any persons so examined by the Governor or other authorized person shall knowingly and wilfully swear falsely concerning the matters aforesaid, every such person is hereby declared to have committed perjury; and for securing to the territory or state the payment of the aforesaid per centum, it is hereby declared that the state shall have a lien upon the railroads of the said company, and upon all other property, estate and effects of the said company, whether real, personal or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company."

The Minnesota and Pacific Company was organized, took the grant of lands, and undertook the construction of the road, but failed. By the constitutional amendment of 1858, the state was authorized to loan its credit to this company and others, and received a mortgage upon the "roads, lands and franchises of the respective companies."

See page 11, General Laws 1858.

The state took a mortgage upon the roads, lands and franchises of the said company.

By a subsequent act of the legislature the governor was directed to foreclose the mortgage, the company having made default. The mortgage was foreclosed, and the Minnesota and Pacific road was bid in by the state.

By subsequent acts the property was restored to the Minnesota and Pacific Company upon certain conditions, which conditions have never been complied with.

The St. Paul and Pacific Railroad Company was duly organized under the act of March 10, 1862, Laws of 1862, Chapter 20, page 247. By Section 1 of this act it was provided:

"That all the rights, benefits, privileges, property, franchises and interests of the Minnesota and Pacific Railroad Company acquired by the State of Minnesota by virtue of any acts, deeds, agreements or thing by the said company heretofore done or suffered, or by virtue of any law of the state or the constitution thereof or of the former territory of Minnesota, or by reason of any sale of the same or any part thereof by the governor of the state on the twenty-third day of June, eighteen hundred and sixty, and bid in and purchased for the benefit of the state, *be and the same are hereby granted and transferred* * * " etc.

Here was a grant to a new company of the lands and franchises (which the court construed to include the perpetual contract of commuted taxation) made after the constitution was adopted.

On March 3, 1865, Congress increased this and the other land grants in Minnesota, from six to ten sections per mile.

13 U. S. Statutes at Large, page 526.

And after the organization of the St. Paul & Pacific R. R. Company, which thus acquired the lands and the franchises of the Minnesota and Pacific Company, the legislature of the State of Minnesota in 1865, not only granted to the St. Paul & Pacific Company, four additional sections per mile and made them forever exempt from taxation except by the payment of a three per cent gross earnings tax, but it changed the gross earnings system from three per cent to a graded system of one, two and three per cent.

Special Laws of 1865, Chapter 6, page 40.

It provided in Section 2 that said additional lands "are hereby granted and assigned unto the said company upon the same terms and conditions as the lands heretofore granted for the same purpose."

The time for completing the road was extended, the forefiture waived, "and all the rights, privileges, franchises and lands conferred by the act of the legislature of the State of Minnesota, approved March 10, 1862, restored, released and granted to the said company."

The act further provided:

"That in consideration of an annual payment of a per centum (as provided in this section) by said corporation as aforesaid, the railroad, its appurtenances and appendages, and all other property, estate and effects of said corporation, which by the provisions of this act contained, said corporation is to acquire, purchase, hold, possess, enjoy or use, for, in or about the construction equipment, renewal, repair, maintaining, or operating its railroad, as also the stock and capital of said company,

shall be and hereby are *forever exempt* from all taxation and from all assessments; and in consideration of the grants made to, and the privileges and franchises conferred upon the company *hereby created*, and of the exemption contained in this section, the said company shall during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March of each and every year, pay into the treasury of the State, one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next, after the said railroad shall be completed and in operation, and shall during the seven years next ensuing, after the expiration of the three years aforesaid, pay into the treasury of this State, on or before the first day of March of each and every year, two per cent. on the gross earnings of said railroad; and shall from and after the expiration of ten years from the completion of thirty miles of said railroad, on or before the first day of March of each and every year, pay into the treasury of this State three per cent of the gross earnings of said railroad; and the payment of such per centum annually as aforesaid, shall be, and is in full of all taxation and assessments whatever."

Then follows a provision for enforcement, identical with that quoted above, p. . . , except that there is here added the following clause:

"Provided Further, that the lands of said company shall be subject to taxation as soon as sold, leased, or contracted to be sold or leased."

See act of February 6, 1864, Special Laws of 1864, Chapter 3, page 174.

The St. Paul and Pacific Company was authorized to create and issue classes of stock, for particular divisions of its line; or in other words, practically to make a separate corporation of the

different divisions. This was done as to the first division of the St. Paul and Pacific, and as we will subsequently show, as to the River Division of the St. Paul and Pacific Co.

For the point we are making it is sufficient to say that the first division of the St. Paul and Pacific Railroad Co. claimed that it had a perpetual contract of commuted taxation, and that its lands were exempt from any other taxation.

It was claimed by the state that the state or territory had no power to make such a contract, and conceding that it had such power, the original contract of commuted taxation did not pass to the St. Paul and Pacific Co., or to the first division of the St. Paul and Pacific Co.

See First Division St. Paul & Pacific R. R. Co. v. Parcher, 14 Minn. 297.

It must be remembered that the court in considering this case is speaking of lands that were granted to the railroad company, both before and after the adoption of the constitution, that the railroad did not pay its original three per cent tax, but one, two and three per cent, under the law of 1865, and that the Supreme Court of Minnesota held that it was a perpetual contract, not only as to the land granted by the act of 1857, but as to that granted by the act of 1865.

The court held that such a provision was a contract right which the legislature in the absence of constitutional inhibition, is competent to grant, quoting the decisions from the Supreme Court of the United States. It was claimed that the grant

was without consideration, but this claim was overruled. It was also claimed that this contract or immunity was not a franchise, and was personal to the Minnesota and Pacific Railroad Company, and did not pass to the subsequent companies by the foreclosure under the act of the legislature of the state of Minnesoa, and did not pass from the St. Paul and Pacific to the First Division of the St. Paul and Pacific, etc.

The court said:

"We are, however, of opinion that this privilege or immunity in reference to taxation, is in no greater degree, personal to the Minnesota & Pacific Railroad Company, than any other of its rights or franchises.

"All the franchises and rights conferred upon the company were granted *for the benefit of the company*, and in that sense were all personal. But we perceive nothing in the language employed in reference to this right, privilege or immunity, to distinguish it, in this respect, from the other rights granted. It would certainly be one of 'the privileges, grants, franchises, immunities and advantages,' the sale and transfer of which is authorized by the provisions of section 21 of the original charter of the company.

"But if this immunity in regard to taxation be not a franchise, in the legitimate meaning of the word, it certainly was, as we have already determined, a *right*, and a *contract right*, to hold the lands exempt from taxation, until the same were sold and conveyed. And as it was not a personal and inalienable right, there is no reason why it would not pass with the lands and as appendant thereto to the State. When the Minnesota & Pacific Railroad Company lost the lands, it lost this right, for it had lost that to which the right related. The question then is, What became of the right? The State took and held what it acquired, not in its sovereign character, but as property, like a pri-

vate individual; and in this capacity it succeeded to the roads, lands and franchises of the company, and in our opinion to this immunity from taxation, as appendant to the lands. If this was not the case, then this immunity was merged or extinguished. That it was not the intention or interest of the state to suffer it to be merged or extinguished, but to hold and transfer it for the purpose of facilitating and hastening the construction of the road, is, we think, apparent for the reasons which we have before advanced for the purpose of showing that the state took, held and transferred the corporate and other franchises of the company unmerged and unextinguished.

"In addition to what was there said, it is entirely proper for us to refer to the state of things existing when the policy to be adopted was under consideration by the legislature. The state was then almost a wilderness. Its population was small and soarse, its capital limited, its business depressed, its resources undeveloped. There was not a mile of railroad within its borders. An outlet by rail for the products of the state was a matter of prime and pressing necessity. The inducements whch we were able to hold out to secure this outlet, and the construction of needed lines of railway, consisted rather in what the state was to be, than in what it was. The country at large had hardly recovered from the financial revulsion of 1856-7. How soon railroads in this state would prove remunerative to their owners, as well as how soon the lands would sell, were matters of conjecture and experiment. And notwithstanding repeated and continued tenders of all the roads, lands and franchises, together with the privileges and exemptions in regard to taxation, it was not until the summer of 1862, that the first ten miles of railway were put into operation in this state. These facts are not without weight in considering whether the grant of lands, without the exemption from taxation, would probably have induced capital to undertake the construction of the roads, especially when we take into account

the proverbially high rates of taxation in newly settled communities.

"They have, as we think, a tendency to show that it was for the interests of the State to hold this exemption unmerged, that it might be enabled to offer it to persons willing to embark in these important enterprises, and thus secure the completion of the same.

"The state then having acquired this immunity from taxation, transferred it with the lands to the St. Paul & Pacific Railroad Company, and thereupon that company became entitled to hold such lands exempt from taxation until the same were sold and conveyed by it. From the views before expressed this consequence follows, whether the immunity be regarded as a franchise, or as a right appendant to the lands, and not a franchise. The St. Paul and Pacific Railroad Company thus holding this immunity when the legislation and arrangement were consummated, under which the 'First Division of the St. Paul and Pacific Railroad Company' became a corporation, and possessed of the lands, franchises and other property acquired as we have before seen through the same, it acquired this immunity also. There was not, in our opinion, a sale and conveyance of the lands within the meaning of section eighteen of the original charter. The lands are still held by the same body corporate which holds and exercises the corporate and other franchises pertaining to that portion of the road and branch to which the lands to which this action relates are applicable. This same body corporate is carrying on the enterprise, and constructing and operating the road and branch for which the lands were granted, and the immunity from taxation conferred. The transaction between the St. Paul and Pacific Railroad Company, and the holders of the preferred and special stock, was not a sale, but rather in the nature of a division or partition of common property."

As to this company and its successor companies, this holding has been followed to the present day.

It will be remembered that the St. Paul, Minneapolis and Manitoba Railroad Co. succeeded to the rights of the St. Paul and Pacific Co. by foreclosure sale, and that the Great Northern Railroad Co. succeeded to the rights of the St. Paul, Minneapolis and Manitoba.

The First Divsion of the St. Paul & Pacific R. R. Co. v. City of St. Paul, 21 Minn. 526.

State v. Northern Pacific R'y., 32 Minn. 294.

Hennepin County v. St. Paul, Minneapolis & Manitoba R. R., 33 Minn. 534.

Stevens County v. St. Paul, Minneapolis & Manitoba R. R., 36 Minn., 467.

County of Todd v. St. Paul, Minneapolis & Manitoba R. R., 38 Minn. 163.

Traverse County v. St. Paul, Minneapolis & Manitoba R. R. Co., 73 Minn. 417.

In the case of the State v. Northern Pacific R'y., 32 Minn. 294, it was held that this commuted system of taxation was not a personal privilege to the original Minnesota & Pacific Co.; but was appurtenant to the line of road and passed to any succeeding company.

In the County of Stevens v. The St. Paul, Minneapolis and Manitoba Railway Company, 36 Minn., 467, the Court had under consideration not only the original grant of 1857, but the enlarged grant of March 2, 1865, heretofore referrd to, and held that as to all the lands, both those granted in 1857 and those in 1865, the commuted system of taxation

applied, was a contract, and could not be changed by the legislature.

The Court said:

"That the exemption from ordinary taxation, created in 1857 in favor of the Minnesota and Pacific Railroad Company, subsequently passed with the lands, and as a right appendant thereto, to the St. Paul and Pacific Railroad Company, and to the First Division of the St. Paul and Pacific Railroad Company, may now be accepted without question. It was so decided 18 years ago in the case of the last named company v. Parcher, 14 Minn. 297, which decision has been ever since followed. State v. Winona & St. Peter R. Co., 21 Minn. 315; Minnesota Central Ry. Co. v. Melvin, Id. 339; Chic., Mil. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217; City of St. Paul v. St. Paul & Sioux City R. Co., 26 Minn. 294 (3 N. W. R. 701); State v. Northern Pacific R. Co., 32 Minn. 294, (20 N. W. R. 234). In the Parcher case, supra, the doubt was expressed as to whether the granted immunity from taxation was a *franchise* of the Minnesota and Pacific Company, which, after resumption by the State, had been included as such in the franchises reconferred upon the St. Paul and Pacific Company. The decision in that case was not put upon that ground, but its correctness has received support from a late decision of the Supreme Court of the United States declaring immunity from taxation to be a franchise. Given v. Wright, 117 U. S. 648, (6 Sup. Ct. Rep., 907). We are not disposed to reconsider a question so long settled, and so often recognized as settled, in this court; and will only add that we do not think that the decision in the Parcher case, sustaining the exemption in favor of the successors of the Minnesota & Pacific Railroad Company, has been disturbed by the decision of the Supreme Court of the United States.

"Assuming, then, that the exemption created in 1857 passed, with the lands, unimpaired to the successors of the Minnesota & Pacific Company, we come to consider how that right was affected by the acts of March 2 and March 4, 1865, (chap-

ters 6 and 9, Special Laws, 1865). By the terms of the earlier of these acts it was provided that the lands of the St. Paul and Pacific Company should be subject to taxation as soon as sold, leased or contracted to be sold or leased. For the purpose of this case it is unnecessary to consider what would have been the effect of this enactment, if, without modification, it had been accepted by the corporation; for it does not appear that there was any acceptance of the provisions of that act prior to the enactment of March 4th. The modification of the right of exemption expressed in the Act of March 2d (assuming that, standing alone, it should be construed as rendering the title still remaining in the railroad company taxable as soon as the lands should be contracted to be sold) could only have been made effectual by the assent of the corporation; for the exemption previously existing was a contract right, which the state alone had not power to impair. First Division, etc. v. Parcher, 14 Minn. 297. Nor until its acceptance, at least, was the Act of March 2 effectual to place any constitutional restraint upon the power of the legislature to enlarge the exemption proposed in it, so that the exemption created in 1857 should be subject to a less restriction or limitation than was expressed in the act of March 2d. From the facts as presented in this case the Act of March 4th appears to have been an offer on the part of the State of another and a modified term respecting the taxation of lands, in place of that embraced in the contract tendered in the enactment of two days previous, so as to protect from taxation the interest of the corporation in its lands, but subjecting that of the purchaser to the operation of the tax law. This, if it did not restrict, did not enlarge, the previously existing exemption, and, being accepted by the corporation, was subject to no constitutional objection. It is not disputed that the exemption here claimed and allowed by the Court below is such as was expressed in the Act of March 4th.

"The point that sections 1 and 3 of article 9 of the constitution forbid this legislation was long ago settled in the Parcher case, above cited, and

in the cases of State v. Winona & St. Peter R. Co., supra, and City of St. Paul v. St. Paul and Sioux City R. Co., supra; it being held that those sections of the constitution did not prevent the legislature from modifying the terms of a provision for the payment of a percentage of gross earnings in lieu of other taxation, in a case where that method of taxation had been established prior to the adoption of the constitution, and, in the latter case cited, that by the Constitutional amendment of 1871 (section 32, article 4) such legislation had been confirmed."

To be sure the Court held that the constitution could not affect these prior grants, but the effect of the decision was also to hold that the constitution did not prevent the legislature from applying this commuted system of taxation to lands granted to the company after the constitution was adopted.

Again, in Traverse County v. St. Paul, Minneapolis and Manitoba Ry. Co., 73 Minn. 417, the same question was involved. The Court said:

"It is a part of the legislative history of Minnesota, both as a territory and as a state, that its policy in regard to taxing land grant roads was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state what was supposed an ultimate and adequate return for the value of the franchises conferred, and which would in the long run, be the equivalent of the company's fair share of taxation. The policy adopted was to provide for these companies paying to the State a certain percentage of their gross earnings in lieu of all other taxation on their railroads and also on their granted lands until sold by the company; this latter being (unfortunately, as subsequent experience has proven) without limitation as to time. The object of this was not to grant a personal favor to the original companies, but to secure the construc-

tion of the lines of road. Hence, as might naturally be supposed, the history of legislation, as well as the decisions of this Court, clearly indicate that the general understanding was that this system of taxation was not personal to the original company, but was to be alike applicable to any of their successors, which might assume the completion of the road. The acts of the legislature on this subject, too numerous to be cited, all bear out this assertion.

"The decisions of this Court from the Parcher case down have all been to the effect that this exemption from ordinary taxation was not simply a personal privilege conferred upon the original company, but was appurtenant to the line of road, and existed in favor of any company which in consideration of the land grant, should assume the construction and maintenance of the line by which it was applicable; that the immunity as well as the burden passed to any company which acquired the road, and assumed its operation and the performance of all the other duties which the original company owed to the public; that the transfer of the road and land grant to such a company did not constitute a sale of the lands within the meaning of either the act of 1857 or of acts similar to those of 1865 already referred to. First Division v. Parcher, supra; State v. Winona & St. Peter R. Co., 21 Minn. 315; Chicago, M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217; City of St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469; County of Nobles v. Sioux City & St. P. Ry. Co., 26 Minn. 294 (3 N. W. 701); State v. St. Paul, Minneapolis and Manitoba Ry. Co., 30 Minn. 311 (15 N. W. 307); State v. Northern Pac. Ry., 32 Minn. 294; (20 N. W. 234); County of Hennepin v. St. Paul M. & M. Ry. Co., 33 Minn. 534 (24 N. W. 196); County of Ramsey v. Chicago, M. & St. P. Ry. Co., 33 Minn. 537 (24 N. W. 313); County of Stevens v. St. Paul, M. & M. Ry. Co., 36 Minn. 467 (31 N. W. 942).

"It has also been repeatedly held by this Court, as well as by the Supreme Court of the United States, that the substitution of an assessment upon

gross earnings in lieu of all other taxes on the road and the granted lands, does not exempt the lands from taxation, but merely substitutes one method of taxation for another, upon the terms and conditions specified; and for that reason the latter court, which is very tenacious of the doctrine that an exemption from taxation must be clearly shown and strictly construed, has held that this doctrine does not apply, at least to its full extent, to such a case. Northern Pac. R. Co. v. Clark, 153 U. S. 252, 14 Sup. Ct. 809; McHenry v. Alford, 168 U. S. 651, 18 Sup. Ct. 242. And this Court held to the same effect in City of St. Paul v. St. Paul & S. C. R. Co., supra.

"In some of these cases the point decided was that any company owning and operating the road was liable to pay the 3 per cent gross earnings tax; but the converse of this must be true, inasmuch as this is a tax on the granted lands (until sold) as well as on the railroads and, if the burden is appurtenant to the road, so must be the reciprocal benefit, the two being parts of a unit. It will also be observed that, in some of the cases, the railway company which was a party to the suit was not one of those to whom the state granted the land, property and franchises of one of the original land grant companies acquired by it under foreclosure of the mortgages executed to secure the state loan of credit in 1858. At least two of the cases (21 Minn. 315; 36 Minn. 467) involved the taxation of lands embraced in the increased grant of 1865; and in neither of them, nor in any of the other cases cited, was it even suggested that there was any distinction, as to taxation, between such lands and those embraced in the original grant of 1857. In fact, except as to lands outside of the 15-mile indemnity limits of the original grant, it would be impossible to distinguish between the two. The whole was treated and adjusted as one grant.

"But there can be no question but that the acts of 1865, already cited, include the increased as well as the original grant, and in terms apply the commuted system of taxation to the whole. This Court

has twice decided that the provisions of these acts exempting the roads and land grant lands from ordinary taxation, in consideration of the payment of a percentage of the gross earings of the road, were, as to the territorial land grant companies, not in conflict with the provisions of the constitution relating to taxation. State v. Winona & St. P. R. Co., supra; City of St. Paul v. St. Paul & S. C. R. Co., supra. But it is immaterial whether these acts were or were not valid when originally enacted, for the reason that they were validated by the constitutional amendment of 1871 (State v. Luther, 56 Minn. 156, 57 N. W. 464); and it could not be claimed in any event that they were repealed or modified prior to the passage of the Anderson bill in 1895.

"Whatever errors of law, if any, may be involved in the practical or judicial construction of either constitution or statutes on the subject of the taxation of 'land grant lands of the old territorial railroad companies or their successors, after that construction has been adopted and acted upon by all departments of the Government, and generally acquiesced in for so many years, it must now be adhered to. It is now too late to think of undoing the past. All these years the defendant has been paying, and the state accepting, taxes on these lands in the substituted or commuted form of a percentage of the gross earnings of the road. This was done for 1894, the very year for which the state is here seeking to enforce these taxes. The question whether the legislation on the subject involves the elements of a contract between the defendant or its predecessor and the state is not necessarily involved, and need not now be considered."

There are other decisions in this State bearing on the Minnesota and Pacific grant, but it is unnecessary to refer to them in this argument.

Winona and St. Peter Railroad Grant.

The Transit Railroad Company, the predecessor

to the Winona and St. Peter R. R. Co., was organized under an act of the legislature of March 3, 1855 (Special Laws 1855, Chap. 27, P. 84). It received a grant of lands under the general omnibus law we have heretofore considered, being sub-chapter 2 of Chap. 1 of the Laws of 1857. Section 4 provides for a tax of three per cent upon its gross earnings in lieu of all other taxes. Sec. 4 is as follows:

"The said lands so granted shall be and are exempted from all taxation until the same shall have been sold and conveyed by said company. In consideration of the grant of land and other franchises and privileges hereby confirmed in and conferred on the Transit Railroad Company, the said company shall pay into the treasury of the Territory or State of Minnesota, three per cent upon all the gross earnings of said road, the amount of the gross earnings to be ascertained by the verified statements of the President and Treasurer of said company as hereinbefore provided for; and the said three per cent shall be so paid into the treasury of the territory or future State of Minnesota within sixty days after any portion of the said road shall be operated and annually thereafter; and the same when paid, shall be in lieu of all taxes whatever."

It is sufficient to say that the history of the Transit Railroad is the same as the history of the Minnesota and Pacific. It was mortgaged to the state, foreclosed and granted to the Winona and St. Peter Railroad Company. Chap. 19, Sp. Laws 1862. A complete history of this transaction will be found in the case of Huff v. The Winona and St. Peter R. R. Co., 11 Minn., 180, et seq. This company also received an

additional grant of four sections per mile after the adoption of the constitution and the commuted system of taxation was changed to a graded system of taxation, in the same manner as was done in the Minnesota and Pacific case. Chap. 10, Sp. Laws 1865, Sec. 5. This act provided for a tax on gross earnings of one per cent for three years, two per cent seven years and three per cent thereafter.

"Such payments shall be in lieu of all taxes and in full of all claims of the state for the grants made to said company; and in consideration of such annual payments the said company shall be forever exempt from all assessment and taxes whatever upon the franchises and estate, real, personal and mixed, and the lands granted to said company shall be exempt from the taxation until contracted to be sold or until leased by said company."

In the case of State v. Winona & St. Peter R. R. Co., 21 Minn. 315, the question involved was whether, in view of the constitutional provision "that laws shall be passed taxing all real and personal property at its true value in money, etc.," the legislature could transfer to the Winona and St. Peter Company the immunity from taxation contained in the charter of the Transit Company.

"By § 4, sub chapter 2, of the act of May 22, 1857, it is enacted that the lands granted by said act to the Transit Railroad Company, 'shall be and are exempted from all taxation, until the same shall have been sold and conveyed by said company.' For an account of the manner in which the Winona and St. Peter Railroad Co., in accordance with the doctrine of the First Division of the St. Paul & Pacific R. Co. v. Parcher, 14 Minn. 297, succeeded

to the 'rights, benefits, privileges, property, franchises and interests' of the Transit R. Co., it will be sufficient to refer to the case of Huff v. Winona & St. Peter R. Co., 11 Minn. 180; and it follows from this fact of successorship, that the lands to which the present proceding relates, being exempt from taxation, were illegally taxed, this case being ruled by First Div. St. P. & Pac. R. Co. v. Parcher. It is, however, contended by the attorney general that, in the case against Parcher, this Court was not called upon to consider, and did not pass upon the question raised by the constitutional requirement, that 'laws shall be passed taxing * * * all real and personal property at its true value in money,' and further that this constitutional provision in effect prohibited and rendered void the transfer, by a law passed after the adoption of the constitution, of the immunity from taxation which was originally conferred upon the Transit Company, and which is now claimed by the Winona and St. Peter Company, as its successor. It is true that this constitutional provision does not appear to be considered in the opinion of this Court in the case referred to. But the consideration and disposition of the point made upon it, is involved in what is said, (on pages 328, 331 of the published opinion) to the effect that it is *by virtue of the amendment to the constitution* that this immunity from taxation, (whether it be regarded as a franchise, or as a right appendant to the lands to which it related) was permitted to be made the subject of the mortgage and forfeiture to the State, and was therefore transferable to the purchaser at the mortgage sale, or to the state under a forfeiture, and also by what is further said in the opinion in reference to the right of the state to hold and transfer whatever it acquired as purchaser at the foreclosure sale, or by virtue of the forfeiture, as property, as a private person might hold and transfer the same, without merger or extinguishment of any of the franchises, rights or immunities possessed by the mortgagors, and which had become the subject of mortgage or forfeiture, under the provisions of the constitutional amendment. In

other words, the constitutional amendment, popularly known as the Five Million Loan Amendment, is *controlling* in reference to its subject. It is not a mere act of the legislature, but a part of the organic and fundamental law, of equal authority, *per se,* with any other provision of the constitution. Being a particular provision, with reference to a particular subject matter, it is, within its own sphere, so far as that subject matter is concerned, paramount and supreme. And it follows that its effect, in permitting the state, by the foreclosure or forfeiture, to acquire, hold and transfer the immunity from taxation, according to the doctrine of the Parcher case, is not controlled or overriden by the general constitutional provision in regard to the taxation before quoted. In reference to the case of Trask v. Maguire, 18 Wall. 391, we think it may be distinguished in some important respects from the case at bar; but if it be in point, we should not deem it to be our duty to recede from or overrule the views expressed in the Parcher case, upon its authority.

Our conclusion is that the judge of the Court below was right in determining that the lands to which the proceeding relates were illegally taxed, and in discharging the same from the taxes assessed upon them, and the attendant costs and penalties, etc. His decision is accordingly affirmed."

Minneapolis and Cedar Valley Railroad Company, now the Chicago, Milwaukee and St. Paul Ry. Co..

This was incorporated under Chap. 146, Laws 1856 and received a grant of lands under §6, subchapter 3, Chap. 1, Laws 1857, for the construction of a road from St. Paul via Mendota, and Faribault to the south line of the Territory of Minnesota, §9 exempted the lands from taxation and provided for commuted taxation as follows:

"§9: The said lands so granted shall be and are

exempt from all taxation until the same shall have been sold and conveyed by said companies. But so soon as the said companies shall have respectively constructed, equipped and put in operation fifty miles of railroad for the transportation of freight and passengers, the said companies shall severally pay into the treasury of the territory or state of Minnesota, in lieu of all taxes whatsoever, upon the property of said companies respectively, the sum of three per cent per annum on the gross earnings of each of the said roads; said gross earnings to be ascertained by a statement under the oaths of the president and treasurer of each of the said roads, which statement shall be filed on or before the first day of January in each year in the office of the Governor of the territory or future state of Minnesota, said payments to be made annually, within sixty days after the filing of the statements aforesaid, and the governor shall have the right to appoint a commissioner to examine the books and accounts of said company, at any time."

This company also gave a mortgage to the state; failed to construct the road, the mortgage was foreclosed, and by Chap. 17, Special Laws 1862 "All rights, benefits, privileges, property, franchises and interests of the Minneapolis and Cedar Valley Railroad Company" acquired by the state was conveyed to Alexander Chambers and others under the name of the Minneapolis, Faribault and Cedar Valley Railroad Company.

Under §6 of this act the form of commuted taxation was changed. The lands were exempted until sold or contracted to be sold.

The act provided in substance that in consideration of a tax on the gross earnings of one per cent for three years, two per cent for seven years and three per cent thereafter the"railroad as also the

stock and capital of said company shall be and hereby are forever exempt from all taxation and from all assessment."

Further provision was then made that this tax should be a first lien upon the road. By Chap 5, Special laws 1865 the time was extended to construct the road and substantially the same provision re-enacted as to taxation.

Chap. 2, Special Laws 1864, changed the name of this corporation to the Minnesota Central Railroad Co. and certain additional powers were conferred, but they are not important to the discussion of this question.

Subsequently the Minnesota Central Co. conveyed this railroad to the McGregor & Western R. Co. It was claimed that this conveyance carried the lands, and hence the lands were taxable. The Court held to the contrary, citing and reaffirming First Division St. Paul and Pacific Co. v. Parcher, supra; Minnesota Central R. R. Co. v. Melvern, 21 M. 339.

Chicago, Milwaukee and St. Paul Railway Co.

In Chicago, Milwaukee and St. Paul Ry. Co. v. Pfaender, 23 Minn. 217, this question was again before the Supreme Court.

This grant of land was a part of the old Minnesota and Pacific grant made by Chap. 1 of Special Laws of 1857. After the foreclosure of the mortgage and its conveyance to the St. Paul and Pacific Company by the State of Minnesota, the St. Paul and Chicago Railroad Company was organized as one of the branches of the St. Paul and Pacific

Company, the history of which we have given. It constitutes the line of the Chicago, Milwaukee and St. Paul Railway Company from St. Paul to La Crescent.

Subsequently the St. Paul and Chicago Railroad Company sold its line to the Chicago, Milwaukee and St. Paul Company, under special laws of 1872, Chap. 93, which authorized the St. Paul and Chicago Company to convey "all its rights, privileges and franchises." This was also a company receiving the additional grant of four sections to the mile by the laws of 1865.

It will also be remembered that the legislature in 1865 changed the system of taxation from the three per cent to a graded system commencing with one per cent, and ultimately resulting in a three per cent tax. The Court said (P. 224):

"As this immunity was not simply a personal privilege conferred upon the original company, but a right appurtenant to its lines of road, (First Div. St. Paul & Pac. R. R. Co. v. Parcher, 14 Minn. 297, 329, 330) it follows that the condition thereto annexed always accompanied it as to every part of the road, so that any company in acquiring any portion thereof, with the franchises and immunities appertaining thereto, took it subject to the condition and burdened with the charge. It follows, from these views, that the plaintiff company became liable to pay three per cent of its yearly gross earnings from and after the expiration of ten years, computed from the time when the first thirty miles of the original lines of road were in fact completed and put in operation. By what company or companies this was done is a matter of no moment as affects the question under consideration. If, as the fact is claimed to be in this case, the expiration of this ten-year period does not co-

incide with the commencement of the fiscal year embraced in its annual account to the state treasurer, the company will be required to pay 2 per cent of its gross earnings accruing during such fiscal year prior to the expiration of such period, and 3 per cent upon that portion thereof accruing thereafter, and its account should be rendered accordingly."

Southern Minnesota Railroad Company.

Under Chicago, Milwaukee and St. Paul Railway Company v. Pfaender, may be considered the grant to the Southern Minnesota Railroad Company, that line extending across the southern part of the State of Minnesota, and now belonging to the Chicago, Milwaukee and St. Paul Railway Company.

By Act of the Legislature of 1855, (Laws 1855, Chap. 24, Sec. 78) the Root River Valley and Southern Minnesota Railroad Company was incorporated. It received a part of the omnibus grant the same as the Minnesota and Pacific Company. (See Sub. Chap. 3, Chap. 1, Laws 1857).

See Section 9 of this act quoted supra, p. ... in connection with the grant to the Minneapolis & Cedar Valley Railroad Co.

This road went through the same process as the Minnesota and Pacific; was foreclosed, and on March 4, 1864, all the lands, rights and franchises of this company were granted to the Southern Minnesota Railroad Company.

(See Sub. Chap. 1 of Chap. 1, Special Laws, Minn., 1864).

This law changed the system of gross earnings

tax from three per cent to a graded system, substantially like the Minnesota and Pacific grant, and by section 10, any further grants of land which should be made by Congress to the State of Minnesota for the benefit of this line were pledged and granted to the Southern Minnesota Railroad Company. Under this grant it received four additional sections per mile. This line was subsequently, pursuant to the authority granted by the legislature, conveyed to the Chicago Milwaukee and St. Paul Railway Company.

St. Paul and Sioux City Railroad Company, now the Chicago, St. Paul, Minneapolis and Omaha Railway Company.

The St. Paul and Sioux City Railroad Company is the successor of that part of the Root River Valley and Southern Minnesota Railroad Company, extending from St. Paul to the southwestern part of the state, authorized by sub chapter 3, of chapter 1, Laws 1857, section 9 of which is the same same section quoted supra, p. ..., in the course of the discussion of grants to the Minneapolis & Cedar Valley Railroad Co.

Under sub-division 2 of Chapter 1 of Special Laws of 1864, the rights acquired by the state under the foreclosure of this branch running from St. Anthony (now Minneapolis) through Kasota and Mankato and to the southwest was conferred upon the Minnesota Valley Railroad Company (now the Chicago, St. Paul, Minneapolis and Omaha Ry. Co.), with all rights, benefits, privil-

eges, property, franchises and interests. By Section 3, the form of taxation was changed so that the company paid one per cent for three years, two per cent for seven years and three per cent thereafter.

This company also received the additional grant of four sections per mile the same as the other territorial roads.

See City of St. Paul v. St. Paul and Sioux City R. Co., 23 M. 469.

County of Noble v. S. C. & St. P. R. Co., 26 Minn. 294.

In the first case above cited it was claimed not only that legislature could not grant this commuted system of taxation after the constitution of 1858 that it did not pass to subsequent and successor companies, but that in any event the contract of 1857 did not cover local assessments and taxes. It was held that if the law of 1857 was not broad enough to include local assessments, *the amendment of its charter in* 1864 *was broad enough, as it reads,* "from all taxation and from all assessments." The Court also held that it was the policy of the state to maintain these laws and give them a liberal construction. The Court said (P. 470):

"In expounding any statute, the sole purpose is to ascertain its true meaning and the intention of the law-maker, so that the objects sought to be accomplished by it may be carried into effect, and not defeated. Hence, in the application of any general rule or canon of interpretation to a particular statute, regard should be had to the reason of the rule, considered in connection with the particular circumstances of that case. It is claimed by the

plaintiff that the provision contained in section 9, of the act of May 22, 1857, Laws 1857, (ex. sess. C. 1, Subc. 3, §9, P. 20) exempting the land grant of the defendant corporation from all taxation, and requiring the annual payment of 3 per cent of the gross earnings of its road, "in lieu of all taxes whatsoever" upon the property of said company, must be strictly construed as having reference solely to the general or ordinary taxes, and not to the special or local assessments, because of the general rule giving to the words 'taxation' and 'all taxes' that limited meaning.

"When used in statutes granting immunity from taxation, such, undoubtedly, is the genral rule to be observed in construing statutes strictly of that character as is the case with statutes exempting burial grounds, cemeteries, churches, public school buildings, and the like, absolutely from all taxation. The reason of this rule grows out of the general policy of the law, by which all kinds of property are required to contribute proportionally to the support of the government, whereby taxation becomes the rule, and exemption the exception. Whenever, therefore, an absolute exemption is claimed under a statute in favor of anyone in respect to any kind of property, it is but reasonable to limit its scope and operation to the express words of the statute, or within some necessary implication from its terms. When, however, the statute relieves, as in this case, the corporate grantee of the exemption from no portion of its just and equal share of taxation in respect to any of its property, but merely provides a mode of commutation therefor, based upon a percentage of earnings or income agreed upon as a just equivalent, equally advantageous and beneficial to the state, this rigid rule of construction, applied to such a condition of things, must be so far modified as to harmonize with other well settled rules of construction observed in determining the meaning of a contract of this character.

"It is a part of the legislative history of the state that its policy in regard to the taxation of this and the other land grant railroads, so-called, was

adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state, and every portion thereof, so far as possible, an ultimate and adequate return for the value of the franchises conferred, including this immunity from taxation. It is also a part of this well known history that, in entering upon the execution of the trust created by the first congressional land grant act, and in the disposition of the lands granted by that act among the four original lands grant companies, in 1857, the then territory, (now state) adopted a distinct and special policy of taxation in reference to those companies, and the lines of road which they were authorized to build, looking to the early completion of those lines, and the just rights and interests alike of the companies, the state at large and all localities therein. This policy contemplated, as a basis of taxation, the annual gross income or earnings of the companies, instead of an *ad valorem* assessment or valuation of their franchises and property; and, instead of a general and local system of taxation, the payment of a fixed per centum of their anual earnings into the state treasury, for the benefit of the whole state, was provided for in lieu of all taxes whatsoever. This it was supposed, would prove less vexatious and burdensome to the companies, especially in the infancy of their existence; ultimately more advantageous and productive to the revenues of the state, and clearly more just and equal to all localities therein, as all would share equally in the benefits to accrue from taxes raised and contributed on account of property held under franchises derived from the whole people. Experience is fast demonstrating the wisdom of this policy, and realizing the expectations of its founders."

As to the question of the right of the legislature to confer this exemption or commuted system of taxation on the successor companies the Court said, (P. 474-475):

"There is no force in the suggestion that the

legislature had no constitutional power to enact this amendment, because of the limitations upon the taxing power imposed by §§1 and 3, of art. 9, of the constitution. The line of railroad in question, together with the lands, property and immunities and franchises pertaining thereto, is held under a grant made prior to the adoption of the constitution, and is hence unaffected by any of its provisions relating to the taxing power, and the mode in which it shall be exercised. This was fully settled by this court in the analagous case of First Div. St. Paul and Pac. R. Co. v. Parcher, 14 Minn. 297. Upon the renewal of the grant, in 1864, to the present company, it was therefore clearly competent for the legislature to change and modify its terms and conditions, so as to require the annual payment of a different rate per cent of the gross earnings of the road, to commence upon the completion of thirty, instead of fifty, miles, and, in consideration of such annual payments, to exempt the railroad, its appurtenances and other property from all taxation, and from all assessments, both general and local. This modification of the original contract was prohibited by no provision of the constitution; and the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since, as valid, both by the executive and legislative departments of the state government, but, by an express constitutional amendment, adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by a vote of the electors of the state."

St. Paul & Duluth Railroad.

This company was first incorporated as the Nebraska and Lake Superior Railroad Company. (Laws 1857, Chap. 93, Page 323). It was subsequently reincorporated as the Lake Superior and Mississippi River Railroad Company. (Chap. 1, Special Laws, 1861).

By Section 18 of this Act, Page 212, it was granted all the swamp lands for seven miles on either side of its line of road with the following provision, "and the land shall not be subject to taxation so long as the fee thereof remains in the said company. *Provided,* that the said company shall sell and dispose of all of said lands within ten years from the time the same shall be certified and duly transferred to the said company from the State." Provision was made for selecting indemnity lands if the lands within seven miles did not amount to seven full sections per mile. On May 5th, 1867, (13 U. S. Statutes, Page 64) Congress made a grant of lands to the state for the benefit of this road and by Act of February 23,1865 (Chap.2 Special Laws 1865, p. 21) this grant was conferred upon the Lake Superior and Mississippi Valley Railroad Company. This law contained a provision for a three per cent tax, in lieu of all other taxes, and provided as follows: "That said railroad lands shall be taxed as other lands in the state, in five years after said company shall become entitled to the said lands." By Chapter 8 of the same laws, this was changed so that the company paid one per cent for three years, two per cent for seven years, and three per cent thereafter, and provided that the lands should be taxed when contracted to be sold, conveyed or leased by said company. This grant, of course, it will be seen, was made after the constitution.

In the case of State v. Luther, 56 Minn., page 156, the question of the taxation of these lands under the ordinary tax laws came before the Court. The

Court again said that it was the settled legislative policy when the constitution was adopted, and since the constitution was adopted to grant this system of taxation to railroads. The Court said:

"The system of providing for the payment of a percentage of the gross earnings of the road in lieu of all other taxes on 'railroad property' and on the lands granted to aid in its construction, while owned by the company, was inaugurated by the territorial legislatures, and was universally in vogue at the date of the adoption of the constitution.

"And after that date the state legislature invariably assumed that they continued to possess the power to adopt this system of commuted taxation when granting lands to aid in the construction of a railroad, whether such lands were the absolute property of the state, or were held by it in trust for that purpose under an act of Congress. This was the practice, not only as to old grants made before the adoption of the constitution, but also as to new grants, both state and Congressional, made after that date."

This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight.

The Court further held that in any event this was ratified by the constitutional amendment of 1871. This subject we shall hereafter consider. To be sure, on the motion for re-argument the Court said that it did not decide the question whether the commuted system of taxation of railroads was a contract which could not be repealed or amended, but the language of the Court is broad enough to sustain such laws, and the Court but states the history of the legislative and executive interpretation of these laws, when it says that such laws

had been universally considered valid and such had been the practice of the legislature, before and after the adoption of the constitution, and of the executive departments of the government. But we will discuss this question further after giving the history of all of the land grants in the state.

Northern Pacific Railroad Company.

By Special Laws of Minnesota for the year 1870, being Chapter 65, passed March 4th, 1870, the provision as to taxation of the railroad and lands of the Lake Superior and Mississippi River Railroad Company, now the St. Paul and Duluth, was made applicable to the Northern Pacific Railroad Company.

In case of State v. Northern Pacific Railroad Company, 32 Minn., 294. The Northern Pacific Company leased a part of the tracks of the St. Paul, Minneapolis and Manitoba Company, formerly the St. Paul and Pacific, and it was held that the three per cent gross earnings provision of the old St. Paul and Pacific Charter applied to the portion of the road so leased, and was not a personal privilege conferred upon the Minnesota and Pacific Railroad Company.

Hastings and Dakota Railroad Company.

The Hastings and Dakota R. R. Co. was formerly the Hastings, Minnesota River and Red River of the North Railroad Co., incorporated February 20, 1857, by Special Act of the Legislature of the State of Minnesota.

On July 4th, 1866, Congress made a grant of

lands to this company to aid in the construction of its road from Hastings to the west line of the State of Minnesota. On March 3, 1866, the Legislature amended the charter of the Hastings, Minnesota River and Red River of the North Railroad Company, accepted the trust provided by the Act of Congress granting the lands to the State of Minnesota for the benefit of said railroad, and conferred said lands upon the Hastings and Dakota Railroad Company. (Chap. 12, Special Laws, 1866). The provision for a commuted system of taxation is the same as that of the other railroads and provides for one per cent for three years, two per cent for seven years and three per cent for all time thereafter. This was in lieu of all taxes upon the railroad and the granted lands of the railroad company.

Western Railroad Company of Minnesota.

The Western Railroad Company of Minnesota was organized under the General Railroad Laws of Minnesota in 1877. By Chapter 201, Special Laws of 1877, the legislature granted to the Western Railroad Company of Minnesota all of the rights, privileges, franchises, lands, property and immunities appertaining to that part of the old St. Paul & Pacific Company granted for the construction of that part of road between Brainerd and Watab, now constituting that part of the St. Paul & Northern Pacific Railroad extending from Brainerd to St. Cloud.

This branch of the old St. Paul & Pacific had

never been constructed, and it was provided in the Special Laws that if this company should undertake and should construct the road, it should receive the grant, franchises and immunities appertaining to the St. Paul & Pacific Railroad. One of those franchises and immunities was the contract for a commuted system of taxation.

The Western Railroad Company of Minnesota under this charter constructed the line within the required time, and received the land grant. The railroad's name was changed to St. Paul & Pacific Railroad Company, and under that name constructed a railroad from St. Cloud to St. Paul. This road is now owned by, and is a part of the Northern Pacific Railway Company.

Section 1 of this act provides as follows:

"Section 1. That the rights, privileges, franchises, grants of land, and property heretofore held by the St. Paul and Pacific Railroad Company, appertaining to the uncompleted portions of that line of railroad extending from Watab to Brainerd, are hereby declared forfeited to the state, without merger or extinguishment, but are hereby preserved, continued and conferred upon the terms and conditions as in this act provided."

It will be seen that the land grant and the rights and franchises of the St. Paul & Pacific were forfeited to the state. To be sure, it was stated that they were without merger or extinguishment, but they were granted to a corporation organized under the general railroad law of Minnesota, and therefore subject to the constitutional provisions as to taxation.

It makes no difference whether these rights were

held without merger or extinguishment or not; they were held by the state and were granted to the Western Railroad Company of Minnesota, after the constitution was adopted; and that grant gave to the Western Railroad Company a perpetual right of commuted taxation.

After the construction of both these pieces of road, i. e., from Brainerd to Watab and from St. Cloud to St. Paul, the question of the taxation of these lines came before the court in the case of State v. N. P. R. R. Co., 36 Minn. 207.

The St. Paul & Northern Pacific Co. had accepted the Taylor's Falls act. The Court held that from Brainerd to Watab the St. Paul & Northern Pacific should pay taxes under the commuted system of taxation originally granted to the St. Paul & Pacific Co. From Watab to St. Paul it should *pay* under the Taylor's Falls act.

Here was not only a legislative, but a judicial recognition of the right of the state *under the constitution* to grant a contract for a commuted system of taxation.

The Court said:

"Among the immunities and privileges which had been enjoyed by the St. Paul and Pacific Company, and to which such succeeding corporation was by the terms of the act to become entitled, was its exemption from ordinary assessment and taxation."

Swamp Land Grants.

By Act of February 16, 1865, Special Laws 1865, Chap. 1, the Legislature granted swamp lands to aid the Southern Minnesota Railroad Company.

This grant provided that the lands should be taxable after five years; but on March 2, 1865, this was changed, and the lands were not made taxable other than by the gross earnings tax until they were contracted to be sold, conveyed or leased by the company.

On March 6, 1863, the Legislature granted to the St. Paul and Pacific Railroad Company a grant of swamp lands providing "that said lands shall not be subject to taxation until the same shall have been sold and conveyed by the said company." (Special Laws 1863, Chap. 4, Page 149).

On March 8, 1861, (Special Laws 1861, Chap. 1, Page 201) the Legislature granted to the Nebraska and Lake Superior (now the St. Paul and Duluth) Railroad Company all the swamp lands within seven miles on each side of its road from St. Paul to Duluth. That grant contained the following provision: "And the land shall not be subject to taxation so long as the fee thereof remains in the said company." Provided, that the said company shall sell and dispose of all of said lands within ten years from the time the same shall be certified and duly transferred to said company from the State."

By Act of March 3, 1865, (Chap. 8, Special Laws 1865) as we have heretofore shown in relation to the St. Paul and Duluth Railroad, the lands were made taxable when contracted to be sold, conveyed or leased, and a perpetual gross earnings tax was imposed upon the railroad company, in lieu of all other taxation.

The Duluth and Iron Range grant involved in this action is the last grant made to any railroad in Minnesota, as in 1881 the people adopted an amendment to the constitution prohibiting the granting of any more lands to railroad companies and reserving all the lands for the school fund.

Other cases from the Supreme Court of Minnesota, sustaining the validity of these contracts, stating the policy of the state, and illustrating various phases of this question, are:

County of Hennepin v. St. P. M. & M. Ry. Co., 33 Minn. 534.

County of Ramsey v. C. M. & St. P. Ry., 33 Minn. 537.

In these two cases the Court held that any lands, however acquired and held for railroad purposes, are only subject to be taxed by the gross earnings system. In the former case, the Court said:

"This is not an immunity from taxation, but a commutation of taxes,—another and substituted way prescribed by law in which the respondent, as the owner of this land, among other property, is to contribute its share to the public revenue."

See also County of Todd v. St. P. & M. Ry., 38 Minn. 163, in which the Court held that a large body of timber land, acquired by the railroad company, not for railroad purposes, and not included in its land grant, should be taxed in the ordinary manner, and was not covered by the three per cent gross earnings tax. The Court, however, reiterated the statement that as to the railroad land grant "it has been said that the purpose of such statutes has been not to exempt property from taxation, but to

provide a substituted method of securing to the state its proper revenue from the taxable property of these corporations."

In the case of the State of Minnesota v. the Northern Pacific Railroad Company, 39 Minn., Page 25, the Court held that under the laws of 1865 and 1870 the gross earnings tax was in lieu of any other form of taxation on lands granted the defendant by the general government, and such other real property as may be used in the operation of its railroad.

In City of St. Paul v. St. Paul, M. & M. Ry. Co., 39 Minn. 112, the Court held that where the Manitoba Company held property in the City of St. Paul, not used for railroad purposes, or which the railroad had no reasonable expectation of using, was subject to taxation in the ordinary way and was not covered by the commuted system. In this respect the Court said:

"As was said in County of Ramsey v. Chic., Mil. § St. P. Ry. Co., supra, these charters do not exempt the property from taxes, but provide a substituted method of taxation, based upon the assumption that the property of the companies will be used for railroad purposes, and thereby an income be derived, the percentage of which received by the state will be equivalent in its results to taxation of the property. In so far as the property is not so used, this end is not accomplished, because it yields no income to the corporation, and hence no revenue to the state."

In the case of the County of Martin v. Drake, 40 Minn. 137, the Court, referring to this commuted system of taxation, said:

"This is equally an answer to the other objection, that it involves unequal or double taxation. Absolute equality in taxation is unattainable. It must happen under any tax law that some property will be taxed twice, while other property will escape altogether. Instances will occur where persons will have to pay tax on property which has ceased to exist. But no question of constitutional law is necessarily raised by such inequalities. They are unavoidable."

WE BELIEVE, THAT IN VIEW OF THE HISTORY OF RAILROAD GRANTS PRIOR TO THE ADOPTION OF THE CONSTITUTION OF 1858, THE COURSE OF LEGISLATION AND OF JUDICIAL CONSTRUCTION BETWEEN 1858 AND THE AMENDMENT OF THE CONSTITUTION OF 1871, AND JUDICIAL AND LEGISLATIVE CONSTRUCTION SINCE THAT DATE, THE CONSTITUTION IS NOT TO BE CONSTRUED AS PROHIBITING THE STATE FROM CONTRACTING FOR THE PAYMENT OF A GROSS EARNINGS TAX IN LIEU OF OTHER TAXATION, UPON THE GROUND THAT SUCH CONTRACT IS IN VIOLATION EITHER OF THE RULE OF CASH VALUATION OR OF THE RULE AS TO UNIFORMITY.

In considering the validity of this commuted system it is unnecessary to consider the question of Section 3, which prohibits exemptions except in certain cases, because as held by the Supreme Court of the state, there is no question of exemption in this case.

It has been repeatedly held that this is not a question of immunity from taxation or exemption from taxation, but a substituted system whereby

railroad property is to contribute its share to the public revenue.

County of Hennepin v. St. Paul, Minneapolis & Manitoba Railroad, 33 Minn. 534.

County of Ramsey v. C. M. & St. P. R. R., 33 Minn. 537, and other cases cited, supra.

We have not therefore, to do with the question of exemption in the consideration of this first question. And in considering, as we may hereafter, the constitutions of other states, the fact that these constitutions may differ from ours on the question of exemption, has no bearing.

The Supreme Court of Minnesota in this case placed the invalidity of these gross earnings contracts on the ground that they might result in an unequal system of taxation, and therefore violate the provision for equality and uniformity in the constitution, and because they were not assessed upon a cash valuation.

State v. Stearns, 72 Minn. 200.

The question is what was meant by the convention and the people by adopting the uniformity and cash valuation provision of the constitution of 1858?

Properly to answer this question, we must recur to the conditions as they existed at that time. The state was sparsely settled, and contained no railroads whatever; its only means of transportation was the Mississippi River during the summer months, and the stage coach; it had no market for its products, and no commerce; it had just emerged

from the great financial crisis of 1857, which had paralyzed its infant industries and stopped its development and growth. There was a great demand for the construction of railroads. From the time of the organization of the territory down to 1858, the legislature had made many grants of lands to aid in their construction. With all these munificent grants, capital could not be enlisted in what experience had shown was a hazardous enterprise. The territory had also granted as a part of the land grants and charters to various railroad companies perpetual contracts for a three per cent gross earnings tax. The first of these contracts was to the Minnesota & Northwestern Railroad Company in 1854, amended in 1856. Others were the Minnesota & Pacific, the Transit Railroad Company, the Minneapolis & Cedar Valley Railroad Co. These railroads now constitute the principal mileage of the Chicago, Milwaukee & St. Paul Railroad Company, the Chicago & Northwestern Railway Company, the Great Northern Railroad Company, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and the Chicago Great Western Railway Company in the state of Minnesota. They constitute the most important and valuable mileage in the state, and without taking into consideration the branches and extensions of many of them, they constitute today 2,700 miles out of the 6,062 total mileage in the state.

These grants had been made at the time the constitutional convention met. It was also the well established law at that time that such grants were

irrevocable contracts. Such had long been the holding of the Supreme Court of the United States, followed by the territorial court of Minnesota. See U. S. v. Minnesota & Northwestern, 1 Minn. 127.

Therefore, *when this amendment of the constitution was adopted, the gross earnings system of taxation was the well settled legislative policy of the territory.*

Many members of the constitutional convention had previously been members of the territorial legislature granting these charters. Not only was it not the intention of the convention to disturb this system of taxation previously granted, but it was the intention to ratify and confirm it, and place the validity of these contracts beyond any doubt. By Section 1 of the schedule to the constitution, it was provided.

"That no inconvenience may arise by reason of a change from a territorial to a permanent state government, it is declared that all rights of action, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place."

In view of these facts, was it the intention of the convention by this constitutional provision to abandon the system of gross earnings tax, thus irrevocably established, and to prevent the legislature from thereafter classifying railroad property in this manner for taxation?

Nothing had occurred to change the policy of the state; no railroads had been constructed; the needs of the state were as great as ever. What reason could have been urged for granting these

contracts before 1858, that did not apply with equal force after that time?

There is nothing in the constitutional debates to indicate that such was the opinion of its members. But it will be said that it was simply the intention of the state to prevent the legislature from thereafter making an irrevocable contract. But the Supreme Court held in the case of State v. Stearns, that the making of an irrevocable contract was only prohibited by the uniform and cash valuation provision of the constitution, so that it must have been either the intention of the convention to assess railroads in a different form and by a direct tax upon the cash value of the property, or it must have been its belief that this constitutional provision did not prohibit the legislature from classifying railroads on the basis of their gross earnings; the latter was undoubtedly the understanding.

Another very important reason why it is evident that the convention meant no change of this system is that it would have destroyed the uniformity which the state claims it was the object of this constitutional provision to maintain, for if the state's construction is correct, we would have two systems of taxation; one, a perpetual system of gross earnings tax for all the mileage constructed under the territorial charters; and the other subject to be changed at any time, to be increased or decreased according to the will of the legislature, and to be levied upon a different classification or basis of value. We do not think it was the intention of the convention to so discriminate in the

mode of taxation of railroad property.

Again, another very cogent argument to our minds, is the construction placed upon this constitutional provision by the legislative and the executive departments of the state.

On March 3, 1865, 13th Statutes at Large, Page 526, Congress made an additional grant of lands of four sections per mile for the benefit of railroads in Minnesota. The legislature of 1865 granted these lands to the territorial roads which had theretofore been incorporated, and changed the system of gross earnings tax from a three per cent to a system of one, two and three per cent. One of these grants (all of which are substantially in the same form) will be found in chapter 6, page 40, Special Laws of 1865.

"Any and all additional grants of lands made prior to the passage of this act, or which may hereafter be made by the Congress of the United States to the State of Minnesota for the purpose of aiding it in the construction of the lines of railroad or any portion of them authorized to be constructed by the St. Paul & Pacific Railroad Company, shall insure to the benefit of said company, and said lands and the present and future interest of the state in or to them, *are hereby granted and assigned* unto the said company upon the same terms and conditions as the lands heretofore granted for the same purpose."

It will be noticed that this act also regranted in different language the contract for commuted taxation, making it one per cent from the first day of March after the passage of the act for a term of three years, two per cent for seven years, and three per cent thereafter. All of the railroads received

like grants. It may be said that this was but an enlargement of the grant and a change of the previous contract in that respect; but, nevertheless, it was a grant of lands by the state to the railroad company, combined with a contract that they should be forever exempt except by the payment of a gross earnings tax.

If the legislature was bound under the provision of the constitution to classify all property in the same manner, and was prohibited from classifying railroads on a gross earnings basis, we fail to see how it could grant an additional four sections of land and put them under a territorial contract as to taxation, any more than it could grant an additional four sections and make a new contract for taxation.

Thereafter, as we have shown in the history of these grants, the legislature continued to make such contracts and grants until 1875, notably the grant to the St. Paul & Duluth Railroad Company in 1865; the Northern Pacific Railway Company in 1870; the Western Railroad of Minnesota in 1877; and the swamp land grants from 1865 to 1875. About the year 1880, the state had become so far developed that the people deemed it wise to change the policy of granting special charters, and the constitutional amendment of 1881 was adopted, prohibiting the granting of lands in aid of railroads, and prohibiting the granting of corporate powers and privileges by special act.

See Chapters 3 and 4, Laws of 1881.

During these years the legislative, the executive and judicial branches of the government of Minnesota conceded the validity of this legislation; railroads accepted these provisions, constructed their roads on the faith of them, and paid the taxes to the state. These taxes included interstate as well as intra-state earnings. The state does not propose to make restitution. For all that appears, the railroads may have paid more than their fair share of taxes.

The constitutional convention contained among its members, many able lawyers; some of them were afterwards members of the legislature granting these charters, and some were members of the judiciary interpreting them, notably Judge Wilson, who concurred in the opinion in the Parcher case.

It is inconceivable that if this provision of the constitution prohibited the granting of such charters, some of the lawyers and members of the legislature and judiciary did not discover this important fact until 1898.

As this court said in the case of Knowlton v. Moore, decided in May of the present year, where it had under consideration the uniform tax provision of the constitution of the United States, as applied to an inheritance tax:

"The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and the framers of our constitution were actively participating in public affairs, thus giving a practical construction to the constitution which they had helped to establish."

Undoubtedly the legislature supposed it had the

same power after 1858 that it had before that time. Mr. Justice Mitchell, in the case of State v. Luther, 56 Minn., 156, said:

"The state legislature invariably assumed that they continued to possess the power to adopt this system of commuted taxation when granting lands to aid in the construction of a railroad, whether such lands were the absolute property of the state, or were held by it in trust for that purpose under an act of Congress. This was the practice, not only as to old grants made before the adoption of the constitution, but also as to new grants, both state and congressional, made after that date."

Furthermore, if this provision of the constitution prevented the making of a contract for a commuted system of gross earnings tax because of non-uniformity and because not assessed upon a cash valuation, then the contract was void from the start, and not void simply when the inequality appeared. At what time did the contract become void? It may be said that it became void only when a tax became unequal, but it does not appear that the taxes ever became unequal or will become unequal. It will only become unequal through and by the enforcement of such legislation as that in question, because if the law is held valid, it will only be as to those corporations chartered after the adoption of the constitution.

As further showing the policy of the state after the adoption of the constitution, we refer the court to the Taylor's Falls act, which is a literal copy of the amended act of the St. Paul & Pacific Railroad passed in 1865. This act was intended to be a contract,because it provided that the railroad company

in consideration of its paying the gross earnings tax, should be *forever exempt from any other taxation or assessment.* It was required to be accepted by the railroad company. As we show in another connection in this brief, if it was intended to be merely a temporary system of taxation, why was the railroad company required to accept it? It was adopted within four years after the decision in the Parcher case, 14 Minn. 297.

Such was not the intention, because in 1887, the legislature passed an act, Section 1, Chapter 11, providing that any railroad company which had not accepted and become subject to the Taylor's Falls act, should thereafter pay the percentage of its gross earnings provided for by that act. All laws passed after 1865 contained the graded system of taxation commencing with one per cent, and, referring to this subject in the case of State v. Northern Pacific Railroad, 36 Minn. 207, the court said:

"This is in accordance with a policy which has been so generally adopted with respect to the railroad system of the state, and had been when the act of 1873 was passed, that it affords reason in support of the construction which is by far the most natural from the letter of the act itself."

There the court was considering the question of whether the St. Paul & Pacific Railroad Company should pay one per cent for three years, two per cent for seven years, or three per cent from the completion of the first thirty miles of its road.

There is an element of good faith involved in these contracts. They were tendered to the railroad companies to induce the construction of roads. They

were accepted in good faith, both parties believed that the power existed to make them. Millions of dollars have been invested on the faith of them; they have been treated as valid by the legislative, executive and judicial branches of the state government. This mode of taxation has been recognized as the settled policy of the state.

As late as 1877, 23 Minn. 469, Mr. Justice Cornell, speaking of this subject, said:

"It is part of the legislative history of the state that its policy in regard to the taxation of this and the other land grant railroads, so-called, was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state, and every portion thereof, so far as possible, an ultimate and adequate return for the value of the franchises conferred, including this immunity from taxation. It is also a part of this well known history that, in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act among the four original land-grant companies, in 1857, the then territory (now state) adopted a distinct and special policy of taxation in reference to those companies and the lines of road which they were authorized to build, looking to the early completion of those lines, and the just rights and interests alike of the companies, the state at large, and all localities therein. This policy contemplated, as a basis of taxation, the annual gross income or earnings of the companies, instead of an ad valorem assessment or valuation of their franchises and property; and, instead of a general and local system of taxation, the payment of a fixed per centum of their annual earnings into the state treasury, for the benefit of the whole state, was provided for in lieu of all taxes whatsoever. This, it was supposed, would prove less vexatious and burdensome to the companies, especially in the infancy of their existence; ultimately more advantageous and produc-

tive to the revenues of the state and clearly more just and equal to all localities therein, as all would share equally in the benefit to accrue from taxes raised and contributed on account of property held under franchises derived from the whole people. Experience is fast demonstrating the wisdom of this policy, and realizing the expectations of its founders."

We quote this language here because it so aptly expresses the policy of the state of Minnesota. It is urged by the counsel for the state in the Stearns case, now pending before this court, that it is the duty of the Supreme Court of the United States, if it consistently can be done, to harmonize its judgment with the judgment of the Supreme Court of Minnesota upholding the law of 1895. We see no reason why this court should not with equal reason attempt to harmonize its judgment with the previous rulings of the court, with the uniform legislative and executive construction of these statutes, and in harmony with the policy that has received such encomiums from the members of the highest court of the state—a policy instigated to develop the state, and which has been so beneficial and on which so much money has been expended in reliance.

The importance of the questions involved in this case, is not confined to the taxes upon the lands. Most of these lands granted to railroads have been sold, are now in the hands of settlers and investors, and are subject to taxation. In a few years this question will cease to be of any importance, as the lands are now being rapidly disposed of.

But this question goes to the foundation of the gross earnings tax. Under the construction con-

tended for by the State, it may tax, as it has attempted to do, lands of the Railway Company and still hold the Railway Company to its obligation to pay three per cent of its gross earnings. Carrying this principle out, the state may also tax stations, shops, structures and roadbed of the Railway Company and still hold it to its obligation to pay the gross earnings tax; or, it may increase the gross earnings tax. The construction contended for by the state would allow the state entirely to change the system of taxation as to all the railroads incorporated after 1858.

The integrity of the gross earnings system of this state is involved. This court said, in the case of Knowlton v. Moore:

"We are therefore bound to give heed to the rule that where the particular construction of the statute will occasion great inconvenience or produce an inequality and injustice, that view is to be avoided if another or more reasonable interpretation is present in the statute."

IT HAS BEEN SETTLED LAW IN THE SUPREME COURT OF MINNESOTA SINCE ITS ORGANIZATION, THAT THE PRACTICAL CONSTRUCTION PLACED UPON CONSTITUTIONAL AND LEGISLATIVE PROVISIONS BY THE LEGISLATURE AND THE EXECUTIVE DEPARTMENT OF THE GOVERNMENT, IS ENTITLED TO GREAT, IF NOT CONTROLLING WEIGHT.

Carson v. Smith, 5 Minn. Gil. 61.

Green v. Knife Falls Boom Corporation, 35 Minn. 161.

City of Faribault v. Misener, 20 Minn. 396.

Ames v. Railroad Co., 21 Minn. 228.

Finck v. City of St. Paul, 61 M. 439.
State v. Moffett, 64 Minn. 292.
State v. Luther, 56 Minn. 156-162.
Traverse County v. St. Paul, Minneapolis and Manitoba R. R. Co., 73 Minn. 417.
State v. Luther.

This was also the rule of the Supreme Court of the United States.

Stuart v. Laird, 1 Cranch, 199.
Martin v. Hunter, 1 Wheaton, 304.
Cohens v. Virginia, 6 Wheaton, 264.
Cooley v. Port Wardens, 12 Howard, 299.
Borrow Giles Lithographic Co. v. Sarony, 111 U. S. 53.
The Laura, 114 U. S. 411.
United States v. Burlington Ry. Co., 98 U. S. 334.
Mobile & Ohio R. R. Co. v. Tennessee, 153 U. S. 502.
Knowlton v. Moore, 20 Sup. Ct. Rep. 747.

A brief review of the Minnesota cases may not be amiss.

In the case of City of Faribault v. Misener, supra, it was claimed that a poll tax of two dollars on every qualified voter in the city of Faribault was not authorized by the provisions of the State of Minnesota requiring taxes to be uniform and to be levied upon the cash valuation. The charter of the city of Faribault provided as follows:

"It shall be lawful for the common council of said city at any time to levy a corporation poll tax

upon every qualified voter in said city, provided that said tax shall not in any one year exceed the sum of two dollars on each person."

It was further provided that the common council should have power to organize fire engine, hook and ladder companies, and that the members thereof should be exempt from highway work and poll tax; also from service on juries, and also from military duty during the continuance of such membership. Pursuant to the authority of the charter the city council provided for a poll tax on every qualified voter except the persons exempt as aforesaid.

It was contended that the clause in the charter exempting firemen from the payment of poll tax, and the ordinance directing the levying or assessment of a poll tax upon the qualified voters except such as were exempt, was in violation of the constitution of the State of Minnesota.

The Court said:

"While the latter clause of this section can only apply to taxes upon property, the former clause is broad enough in its terms to include any possible form of taxation, whether of persons or property, and to prohibit all exemptions whatsoever. Upon a strict construction of its language, a poll tax upon qualified voters alone is as objectionable as a poll tax on all qualified voters except firemen, for it is undoubtedly *possible* to levy and assess a poll tax upon every inhabitant of the city, of whatsoever sex, age or occupation."

* * * * * * * * * * * * * * * *

"Whether the deviation in the present case is such as to amount to a disregard of the constitu-

tional requirement, is a question upon which much light will be thrown by a review of the legislation of the territory and state of Minnesota upon the subject of poll taxes."

The court then gives a history of the legislation of the state imposing this tax, commencing with the Revised Statutes of 1851, and ending with the Statutes of 1866. As to this legislative construction the Court said:

"At almost every session of the state legislature, cities have been incorporated under charters providing for the levy of a poll tax, in some cases on all qualified voters, and in others on all qualified voters except firemen. Sp. Laws 1858, chaps. 71, 78, 79; 1862, chap. 1; 1863, chap. 6; 1864, chap. 6; 1865, chap. 13; 1866, chap. 18; 1867, chap. 19; 1872, chap. 10, &c."

The plaintiff's and the other charters do not impose the poll tax upon precisely the same class of inhabitants on whom the highway poll tax is imposed, nor do they allow precisely the same exemptions; but the general laws and the city charters alike impose a poll tax upon a minority of the inhabitants, and they all contain exceptions of persons, belonging to the class on whom the tax is laid, but who are specially exempted from its burden, and they alike deviate from rigid equality of taxation in allowing any exception or exemption whatever.

Under these general laws and city charters, the highway labor tax in townships, and the corporation poll tax in cities, have been levied,assessed and collected during the whole period which has elapsed since the adoption of the constitution, and the highway tax from the earliest days of the existence of Minnesota as a territory. If it was the intention of the framers of the constitution, by the general clause requiring equality of taxation, to forbid taxation by the poll as it had been practiced under the territorial government, it is remarkable that the meaning and effect of the constitutional prohibition

should have been so entirely misapprehended by the legislature and the people for so many years.

This long continued acquiescence of the people in the laws under which these taxes have been collected in towns and cities throughout the state, has established, as a legislative and popular construction of the constitution, that the clause under consideration does not forbid taxation by the poll in the manner in which it has been imposed by those laws, and that the taxes so imposed are 'as nearly equal as may be,' as nearly equal as the nature of this mode of taxation permits, although they may deviate from an ideal standard of equality.

A practical construction of the constitution, which has been adopted and followed in good faith by the legislature and people for many years, is always entitled to receive great consideration from the courts. Rogers v. Goodwin, 2 Mass. 477; Packard v. Richardson, 17 Mass. 121, 143; Moers v. Reading, 21 Penn. St. 188; McCulloch v. Maryland, 4 Wheaton, 316; Bradford v. Jones, 1 Md. 369; Mayor of Baltimore v. State, 15 Md. 458; Loring v. Benedict, 15 Minn. 203. Applying this rule to the present case, and a fitter case for such application can rarely occur, we are of opinion that the charter and ordinance in question are not repugnant to the constitution of the state."

Here was a case where it was admitted that the poll tax was not uniform; but this system of taxation had been in existence in territorial days, was in existence when the constitution was adopted, and was continued in existence by many laws of the legislature, and by city charters and ordinances after the adoption of the constitution. This practical construction thus placed upon the constitution was held controlling by the Supreme Court of Minnesota.

Let us next consider the case of Ames v. Lake

Superior & Mississippi Railroad Company, 21 Minn. 241.

Section 2, Article 10 of the constitution of the state of Minnesota provides:

"No corporation shall be formed under special acts except for municipal purposes."

The Nebraska & Lake Superior Railroad Co., as we have shown, was organized under a territorial act. On March 8, 1861, the legislature passed an act entitled, "An Act to amend an act entitled 'An Act to incorporate the Nebraska & Lake Superior Railroad Company."

It is unnecessary to go into the details of this act, but suffice it to say that the amendment practically made a new corporation; it changed the location and direction of the railroad, and changed its powers in many respects.

On the first argument of the case the court held the act unconstitutional as creating a corporation. A re-argument was granted, and after a most elaborate argument and thorough consideration, the first holding was reversed, and it was held that this provision of the constitution did not prohibit such an amendment to the first charter. The Court said:

"The legislature, at an early day in the history of the constitution, adopted, and has since acted on, a construction of it which would support the act in question. It has repeatedly, and in the most solemn manner, recognized the validity of that act; and such recognition appears to have been, until this case arose, acquiesced in by the people. Many acts relating to other corporations, and having some, at least, of the objectionable features contained in the act before us, were passed at an

early day, and have been repeatedly recognized by the legislature, and seem to have been acquiesced in by the people. 'A practical construction of the constitution, which has been adopted and followed in good faith by the legislature and people, for many years, is always entitled to receive great consideration from the courts.' City of Faribault v. Misener, 20 Minn. 396, and cases cited.

"It is not meant by this that a clearly and obviously erroneous construction of the constitution may become controlling by legislative adoption, but that, in a case of doubt, the court may and ought to resort for aid to the acts of the legislature and the people, in construing the provision of the constitution alleged to have been violated. And we think such practical construction is entitled to greater weight, when in reliance upon it great enterprises, in which the state as well as individuals are interested, have been undertaken and carried out, and vast sums of money expended or invested in such enterprises."

Again, in the case of the State v. Moffett, 64 Minn. 292, the construction of the provision of our constitution in relation to taxation came before the court. Since the organization of the state, there had been in existence in Minnesota, laws which authorized a person, in making up his property for taxation, to deduct from his credits the amount of his bona fide indebtedness. It was claimed that this was in violation of the provisions of the constitution in relation to uniformity of taxation.

While admitting that it was difficult to answer the argument of the Supreme Court of Ohio that this was a violation of the provisions of the constitution, the Court said:

"We shall not consider the subject upon its merits, nor indicate what our conclusion might be if we regarded the question as an open one to be

determined after a critical examination of the constitutional provisions. We regard the point submitted as foreclosed by the practical construction which has been placed upon sections 1 and 3 of Article 9, for almost forty years, really during the entire period of statehood, by the legislative, executive and judicial branches of the state government."

After reviewing somewhat the legislation on this subject, the Court said:

"Nor had the statutory provision or the constitutional question involved been allowed to escape attention, for, as early as 1864, the then attorney general, in a communication to the governor, gave it as his opinion that the provision giving the right to deduct the amount of all bona fide debts, the excess only being credits liable to taxation, was obnoxious to the constitution. Opinions Attorneys General (1858-1884 Ed.) 148, 150. But, notwithstanding this official opinion, the executive department of the state has always recognized the validity of the law, and the right to make deductions has never been questioned until the present time by any of the officers to whom has been committed the duty of making assessments and collecting taxes. Again, the validity of this statutory provision has always been taken for granted in the judicial department of the state government. It has always been assumed that the practical construction placed upon the constitutional provisions by the legislative and the executive branches was correct; and upon this assumption the courts have acted hundreds of times, in all probability; and in this construction the people of the entire state have acquiesced for nearly two score years. These facts indicate clearly in what sense the constitutional provisions relied on by counsel for appellant were understood by all, and what it was supposed they meant. This practical construction cannot be disregarded, but must be allowed to control the interpretation to be placed upon the language by this court. Therefore, to the first question found in the

certification, we answer that the provision of G. S. 1894, §1526, which authorizes the deduction therein specified, is not obnoxious to any part of article 9 of the state constitution."

In State v. Luther, 56 M. 156, the court reviewed the history of this class of legislation to show a legislative cinstruction placed upon the constitution and summed up the argument by saying "*This amounted to a legislative construction of the constitution which of itself would be entitled to great weight.*"

Again, in the case of Traverse County v. St. Paul, Minneapolis & Manitoba R. R. Co., 73 Minn. 426, the Court said:

"Whatever errors of law, if any, may be involved in the practical or judicial construction of either constitution or statutes on the subject of the taxation of 'land grant' lands of the old territorial railroad companies or their successors, after that construction has been adopted and acted upon by all departments of the government, and generally acquiesced in for so many years, it must now be adhered to. It is now too late to think of undoing the past. All these years the defendant has been paying, and the state accepting, taxes on these lands in the substituted or commuted form of a percentage of the gross earnings of the road. This was done for 1894, the very year for which the state is here seeking to enforce these taxes. The question whether the legislation on the subject involves the elements of a contract between the defendant or its predecessor and the state is not necessarily involved, and need not now be considered."

In the case of Knowlton v. Moore, this court had under consideration the validity of the graded inheritance tax, the amount of the tax depending up-

on the degree of relationship of the legatees and upon the amount of the legacy.

The questions involved were, first, whether this was a direct tax within section 9 of article 1 of the constitution of the United States, and hence invalid because not levied in proportion to the census or enumeration; and, second, if it was not a direct tax, whether it was uniform throughout the United States within the meaning of section 8 of article 1. The court dwelt upon the circumstance that the constitution was adopted in the light of the enactment of such statutes during colonial times, pointed out that the legislative construction placed upon this constitution during the first seventy years of the government was entitled to great weight, and held that the fact that members of the constitutional convention were also members of the colonial government, and afterwards members of the congress adopting such legislation, showed that in the opinion of the statesmen of that time the constitution did not prohibit non-uniformity as between individuals, but simply enforced uniformity as to the states or different parts of the United States. The court said:

"The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and framers of our constitution were actively participating in public affairs, thus giving a practical construction to the constitution which they had helped to establish. Even the then members of the congress who had not been delegates to the convention which framed the constitution must have had a keen appreciation of the influences which had shaped the constitution and the restrictions which it embodied, since all questions which

related to the constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of congress because exclusively within state authority. It is, moreover, worthy of remark that similar taxes have at other periods, and for a considerable time been enforced; and, although their constitutionality was assailed on other grounds held unsound by this court, the question of the want of authority of congress to levy a tax on inheritances and legacies was never urged against the acts in question." * * *

"It cannot therefore be supposed that the framers of the constitution, in using the words 'uniform throughout the United States, contemplated to confer the power to levy duties, imposts, and excises, and yet to accompany this grant of authority with a restriction which had never found expression as to such taxes at that time anywhere, and which was contrary to the practice which had uniformly obtained both in the mother country and in the colonies and in the states prior to the adoption of the constitution. But one of the most satisfactory answers to the argument that the uniformity required by the constitution is the same as the equal and uniform clause which has since been embodied in so many of the state constitutions, results from a review of the practice under the constitution from the beginning. From the very first congress down to the present date, in laying duties, imposts, and excises the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced. Take, for a general example, specific import duties, by which particular specific rates are imposed on enumerated articles, without reference to their value. It is manifest that all such duties are void, if intrinsic equality and uniformity be the rule, and yet in all the great controversies which have arisen over the policy of impost duties generally, and particularly as to the economic wisdom

of specific duties, never has it been contended that the power to impose them did not exist because of the uniformity clause of the constitution. So, also, mention may be made of the common form of the excises on distilled spirits with the tax per gallon, without reference to the value thereof."

BUT APART FROM THE UNIFORM CONSTRUCTION PLACED UPON THIS CONSTITUTIONAL PROVISION IN MINNESOTA, AND TREATING THE MATTER AS AN ORIGINAL QUESTION, WAS NOT THIS CLASSIFICATION OF RAILROADS BY REASON OF THE NATURE OF THE PROPERTY, A REASONABLE CLASSIFICATION UNDER THE CONSTITUTION?

The language is that "all taxes raised in this state shall be as nearly equal as may and all property on which taxes are to be levied, shall have a cash valuation and be equalized and uniform throughout the state."

This may be divided into two parts; one, that the taxes shall be as nearly equal as may be, and the other that the property shall have a cash valuation and be equalized and uniform.

Absolute equality is not necessary. The Supreme Court of Minnesota said, in County of Martin v. Drake, 40 Minn. 137:

"Absolute equality in taxation is unattainable; it is only approximate equality that can ever be attained."

This court also said in the tax cases:

"Perfect uniformity and perfect equality of taxation in all respects from which the human mind can view it, is a baseless dream."

Every state does, and must necessarily classify its property.

In the case of the State v. Pioneer Savings & Loan Co., 63 Minn. 88, the Supreme Court held that savings and loan associations might be classified on the basis of the value of their stock. The court said:

"While the constitution requires all property not exempted by it to be taxed according to its true value in money, the method of taxation is left with the legislature, and it may provide for the taxation of each item of the property of a corporation specifically, or substitute for this method the taxation of its stock which represents its property."

Again, on page 87 of the opinion, the court said:

"These provisions of the fundamental law of the state are imperative and require that taxes shall be uniform and equal as near as may be, and that all property not exempted by the constitution shall be taxed according to its true value in money. The method of securing these results is left to the legislature, and the mere fact that the statute here in question seeks to take building and loan associations of the class to which defendant belongs, out of the operation of the general tax law of the state, does not make the statute unconstitutional provided it secures substantial equality of taxation of all the property held or owned by the class for whose benefit the law was enacted."

The taxation of the stock of the corporation was certainly not a direct valuation of its property, but it shows the necessity of classifying property.

What is the value of railroad property? It is distinguished from ordinary property; its cuts and embankments have no commercial value; they cannot be sold; its ties, rails, nuts and bolts, are worth nothing except for old iron. The railroad cannot

be sold in the market; it cannot be put to any different use; it is bound to a perpetual public use by the laws of the commonwealth; it is a quasi-public institution. Its earnings are governed by legislative and executive boards of the states and the federal government. It may have cost millions, but unless it will earn something more than its operating expenses, it is worth nothing. Its franchises cannot be valued in money, but as a part of its earning capacity, they are valuable. The very nature of railroad property of necessity makes its earning capacity practically its only basis of valuation. No other property that we can recall, occupies this position. These facts were potent in the minds of the legislature of the territory and of the state when they inaugurated the wise policy of taxing railroads upon their gross earnings. It was economical; it saved the machinery of local taxation; it was profitable to the public. It is yielding the state annually more than $1,200,000 of money, the cost of collecting which is nothing. It is increasing constantly as the traffic increases.

The question simply is—whether the gross earnings tax laws passed after 1858 *were good taxation —whether it was a reasonable classification of railroad property for the purposes of valuation?* If it was, the contract is valid, because we have seen that there is no inhibition in the constitution against making perpetual contracts. If it was not, then the legislature which passed them, the executive departments of the state and the courts which enforced them, were under a misapprehension as

to the effect of this constitutional provision. It is as nearly equal and uniform as the poll tax which was levied only upon a certain class of citizens, and in reference to which the Supreme Court of Minnesota said in 20th Minn. 396:

"This long continued acquiescence of the people * * in towns and cities throughout the state has established as a legislative and popular construction of the constitution that the clause under consideration does not forbid taxation by the poll in the manner in which it has been imposed by those laws, and that the taxes so imposed are 'as nearly equal as may be,' as nearly equal as the nature of this mode of taxation permits although they may deviate from an ideal standard of equality."

We doubt if in any fifty years the legislature could have provided a system of taxation that would have been more nearly equal and uniform than the tax upon the gross earnings, adopted by this state. It is possible that in some periods the railroads may have paid a less tax than other property; it is more probable that they have paid more. But the law does not require the property to be valued annually or biennially; real estate is valued biennially; personal property annually. Would it be an infraction of the law if real estate was valued once in five years and personal property annually?

Approximate equality and approximate uniformity were the objects of the framers of the constitution. It was to prohibit the legislature from placing a different value upon properties of the same kind owned by persons or corporations, thereby discriminating in taxation against persons and corporations situated in the same class, or between

which there was no reason for classification. It was a wise provision, but it was not intended, has never been construed, and should not now be construed to prohibit reasonable classification in the assessment of properties such as their nature demands, and which require different modes of arriving at their value. Any valuation of railroad property in any other manner than by what it will earn, is necessarily a guess.

In the year 1898, the railroads in Minnesota paid into the treasury taxes on their gross earnings amounting to $1,261,352.47. The rate was three per cent. By a reference to the annual report of the Railroad Commission of Minnesota for 1899, it will be found that the total gross earnings for the entire lines of all railroads in the state of Minnesota and in other states reporting to the Railroad and Warehouse Commission of Minnesota, was $167,614,204. The total amount of taxes paid by the same in all the states through which they pass, is reported as $5,408,360, thus showing a rate of taxation of 3-22/100 per cent.

Of these railroads which reported to the Minnesota Commission, Illinois, Iowa, North and South Dakota and Montana, pay taxes upon the right of way, roadway, rolling stock and property, and in some of them the rate of taxation on all property is much higher than in Minnesota, so that it will be seen that for the year 1899 the gross earnings tax in Minnesota approximated very closely the taxes of other states. For the year 1896, the earnings of the railroads in the United States amounted

to $1,279,194,107. The total taxes paid by these roads was $39,970,791, being at the rate of 3 1/10 per cent of the gross earnings of all railroads. (Statistics Interstate Commerce 1896, pages 55 and 56).

The Erie paid taxes at the rate of 2.6 per cent of its gross earnings. The Baltimore & Ohio at the rate of 1.7 per cent. Looking at the railroads as grouped by the Interstate Commerce Commission in published reports, it will be seen that all the roads in the six New England states, taken as a whole, paid taxes at the rate of 3.6 per cent of the gross earnings. Of course this included the assessments in Boston and all of the large cities.

In New York, Pennsylvania, New Jersey, Delaware and Maryland railroads paid taxes on an assessment of $14,080 per mile, being 2.7 per cent of their gross earnings. Interst. Com. Statistics, 1896, p. 55.

Had Minnesota roads paid a direct tax on the same valuation per mile as Illinois, to-wit, $8,218 per mile, the assessed valuation of the roads for 1898 would have been $49,927,506. This at a rate of 2.4 per cent ,being the fair average rate of taxation in Minnesota, would have yielded a tax to the state of only $1,195,860.

Perhaps it might be said that these figures are more appropriate for the legislature than for the courts, but it is argued that the gross earnings tax is unlawful because it is not uniform. We believe that the tax on the railroad earnings has increased much more rapidly than other taxable property in

the state. The amount of gross earnings paid by the railroads in Minnesota in 1880, was $323,433.10; in 1890, $743,005.87. The mileage in 1890, was 5,409 miles. The mileage in 1898 was 6,062 miles, and the gross earnings were $1,261,271, or $518,195.90 more than in 1890, there being only a little over 600 miles additional railroad.

What becomes of the argument of the court in the Stearns case, that by reason of the contract for commuted taxation, the taxes will not be uniform?

As a matter of law we say that this was good taxation after the adoption of the constitution, and it is good taxation now. If it was good taxation the contracts were valid.

AN EXAMINATION OF THE CONSTITUTION, LEGISLATIVE PROVISIONS FOR TAXATION, AND THE DECISIONS OF THE OTHER STATES, WILL SHOW THAT OUR CONSTRUCTION OF THIS CONSTITUTIONAL PROVISION IS A REASONABLE AND PROPER CONSTRUCTION.

NORTH DAKOTA.

The Enabling Act of the Territory of Dakota provided as follows:

"No law shall be passed impairing the rights of private owners, nor shall any discrimination be made in taxing different kinds of property, but the property subject to taxation shall be in proportion to the value of the property taxed."

It was claimed in the case of McHenry v. Alford, 168 U. S. 61, that this provision of the enabling act of Dakota, prohibited the legislature of that territory from taxing railroads upon a gross earnings

basis, because it was a discrimination in the mode of taxation, and the tax was not levied upon the value of the property.

We see no distinction between the provisions of the constitution of Minnesota and the organic act of the territory of Dakota. Let us examine these provisions. They may be divided into two parts: First, that the taxes to be raised shall be as nearly equal as may be; and second, that the property to be taxed shall have a cash valuation. The Dakota organic act provides that no discrimination shall be made in taxing different kinds of property. This is a more stringent and broader provision than ours, that provides that taxes shall be as nearly equal as may be, and shall be uniform.

The second provision in the Dakota organic act is that all property subject to taxation shall be in proportion to the value of the property taxed. But does this differ from the Minnesota constitution, that the property on which taxes are to be levied shall have a cash valuation? It is a mere difference in words. The "value" of the property means its cash value. In speaking of values, we know of no basis except the cash value; no other standard is known, and when we say that property subject to taxation shall be taxed in proportion to the value of the property taxed, it means that the property shall have a cash value, and that taxes shall be levied on that basis. We fail to see any important distinction between the two provisions.

But the counsel who argued the case of State v. Stearns in the Supreme Court of the United States,

insisted that the enabling act of Dakota differs from the constitution in Minnesota in that the Minnesota constitution prohibits exemptions. That provision is entirely immaterial to the discussion, because, as the Supreme Court of Minnesota has frequently held, this is not a question of exemption, but a question as to whether the tax is uniform and made upon a-cash valuation. The Supreme Court, in deciding the Stearns case based its decision upon two grounds—first, that the gross earnings tax would not continue to be uniform and equal; and second, that it is not upon a cash valuation. Therefore, the question of exemption cuts no figure whatever.

Again, a reasonable and liberal construction should be placed upon this provision of the constitution. It is not a case of exemption which must be strictly construed, but a case of commuted taxation which should be liberally construed to sustain the law.

City of St. Paul v. Sioux City Ry. Co., 23 Minn. 41.

The court held in McHenry v. Alford that railroads, including their land grants, justified a classification for taxation by a different method and upon different lines from individual property.

MAINE.

Article 9, Section 8 of the constitution of Maine provides:

"All taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof."

Freeman's Supplement to the Statutes of Maine, Section 42, provides for an annual excise tax upon the gross receipts.

Title 1, Chapter 6, Section 41, Statutes of 1883, provides for an annual excise tax for the privilege of exercising its franchise in the state, which tax is in lieu of all taxes upon such railroad, its property and stock.

So far as we have been able to find, no decision of this court has held this tax invalid, and it has uniformly been enforced.

NEW JERSEY.

Const. Article 4, Section 7, Cl. 12: "Property shall be assessed for taxes under general laws and by a uniform rule according to its true value."

The court held that this provision did not take away from the legislature the power of selecting the subjects of taxation, but it requires that the members of the class selected shall be included in the taxation law, and that the rule applied thereto shall be uniform as to the whole class, and that the as-

sessment shall be made according to the true value of the property constituting the class.

State ex rel v. Executors Runyon, 41 N. J. Law, 98.

State Board of Assessors v. Central R. R. Co., 48 N. J. Law, 146.

In the latter case the court said in the opinion, page 280:

"Railroad and canal property being peculiar property which cannot in justice to the owner be valued in the same way as other property of a like nature, the legislature was bound to provide a proper method of valuing it justly for the purpose of taxation. Such method must be a peculiar one."

In the opinion of Judge Parker, on page 300, he says:

"In the opinion of the Supreme Court in this case it is conceded that the legislature has the power to classify property for the purpose of taxation, but it is maitained that a class must not be declared arbitrarily, and that it must arise out of the nature of the things classed. This is true, but is not property used by railroad and canal companies for the purposes of their business, a class of property arising out of its nature? It is a class universally recognized as different from any other class in many respects. It is not the abstract value of the rails and ties as so much steel and wood, or of the land on which they rest as farm land or building lots, or of the tangible personal property in itself considered, which are alone to be taken into account in ascertaining the true value of property used for railroad purposes, but the franchise also, which puts life into what otherwise would be comparatively dead property, of little value. The true value of property used for railroad or canal purposes cannot be arrived at except by treating it as a class by itself.

"This view is sustained, not only by our common knowledge gained by observation, but is held by numerous decisions of the courts.

"In 9 Otto 722, Chief Justice Waite says: 'Railroads are a peculiar species of property, and railroad corporations are in some respects peculiar corporations.'

"In the case of Louisville and Nashville R. R. Co. v. State of Kentucky, Justice Matthews said: 'The right to classify railroad property as a separate class, for purposes of taxation, grows out of the inherent nature of the property'."

Again, on page 299, the court states that insurance companies doing business in the state of New Jersey are taxed two per cent upon all premiums received.

ILLINOIS.

At the time the decisions were rendered to which we refer, the constitution of the state of Illinois provided that "the General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise.

The charter of the Illinois Central Railroad provided that it should pay a tax of seven per cent on its gross earnings, and it is well known that that company has, ever since that date, paid this tax.

In the case of Illinois Central v. McLean, Ill. Reports, vol. 17, the court held this provision of

the constitution required that the property be taxed in proportion to its value. In that respect it does not differ from the constitution of Minnesota.

The court said, page 294, of the opinion:

"Power, then, to make a flexible rule became indispensable to reach and remedy an inequality inseparable from the nature of these circumstances, and irremediable by a uniform and proportionate rule, assessed on actual appraisements of visible property. Therefore, this general power to tax these, which, when exercised generally upon all, or specially upon one corporation, may well commute, estimate, include and compound within the rule of assessment, whatever of real or personal property the individual or corporation may use in the calling, or with the franchise.

"Such, we view the rule adopted with the plaintiff, by taking five per cent of the gross income, in lieu of all taxes for a period of six years, as well as for the grants, privileges and franchises conferred, and after that period expires, to put them upon the footing of an assessment equal to two per cent addition to the five per cent."

In the case of the People v. Barger, 62 Ill. 456, the court held that this constitutional provision of Illinois did not authorize the legislature to exempt any property. The court said, referring to the case in 17 Ill.:

"The case proceeds on the principle that the proportion of the earnings of the company to be paid to the state is equal to the burden of the state tax imposed on the citizens and other corporations in the state, which is thought to answer the requirements of the constitution, that 'every person or corporation shall pay a tax in proportion to his or her property.' The case can be supported on no other principle."

ALABAMA.

The constitution provides, Article 11, Section 1:

"The taxes levied on property of this state shall be assessed in exact proportion to the value of such property."

"Section 6. Property of private corporations, associations and individuals of this state, shall forever be taxed at the same rate."

Classification is allowed in Alabama.

In State Bank v. Board of Revenue of Montgomery County, 91 Alabama, 8 Southern Reporter, 852, the court had under consideration a law providing for the taxation of shares in national and in state banks. The court held that under Section 6, no discrimination could be made between shares in state banks and shares in national banks, for purposes of taxation; but it was held that bank stock generally did not have to be subject to the same tax as was levied upon other property in the state. The court said:

"The constitution of this state, art. 11, § 1, ordains that 'all taxes levied on property in this state shall be assessed in exact proportion to the value of such property.' 'Sec. 6. The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate.' We have several times had occasion to consider these clauses of the constitution. We have not held that they exact a horizontal tax, nor that the legislature must levy a tax upon every description of property. See Section 454 of the Code of 1886. Nor is it necessary that we should express any opinion at this time whether every species of property, if taxed at all, must necessarily be taxed at the same rate per

centum. See Code 1886, §§ 451, 455, 456. What we do decide is that, whenever the legislature levies a tax on property, the rate must be in exact proportion to the value of such property; and that, if a tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate, whether it belongs to an individual, an association of persons, or to a private corporation. We mean by this not only that in this regard natural persons, individuals, or companies stand on the same footing with private corporations, but also that each individual, association, or private corporation is, under our constitution, endowed with the same rights, and subject to the same burdens, as are enjoyed or suffered by every other natural person, association of persons, or private corporation. The following authorities render it unnecessary for us to go into the argument at greater length: Mayor, etc., v. Insurance Co., 53 Ala. 570; State Auditor v. Jackson Co., 65 Ala. 142; Maguire v. Board, 71 Ala. 401. See also, Bank v. Mayor, 62 Ala. 284; Sumter Co. v. Bank, Id. 464; Perry Co. v. Railroad Co., 65 Ala. 391; Pollard v. State, Id. 628. We need scarcely say that bank shares in a national bank and bank shares in a state bank belong to one species of moneyed capital. Any attempt to draw a distinction between them as subjects of taxation would be futile. In assessing the one our statute allows a deduction of the tax-payer's indebtedness, and taxes the surplus. In assessing the other it allows no such deduction. We hold that this is a violation of section 6, art. 11, of Alabama's constitution, and that the shareholders in state banks are entitled to the same deductions as the statute accords to the shareholders of national banks."

Without further comment we cite:

Trustee of Griswold College v. Iowa, 46 Io. 275;

Railroad Co. v. Morris, 7 Kan. 210.

Francis v. Railroad Co., 19 Kan. 303.

Louisiana State Lottery Co. v. New Orleans, 24 La. 86;
New Orleans v. Kauffman, 29 La. 283;
New Orleans v. Davidson, 30 La. 554;
New Orleans v. Fourchey, 30 La. 910;
People v. The Auditor, 7 Mich. 84;
Youngblood v. Sexton, 32 Mich. 406;
Kittanning Coal Co. v. Commonwealth, 79 Pa. St. 100;
Mississippi Mills ——v. Cook, 56 Miss. 40.
State v. Crittenden County, 19 Ark. 360;
St. Louis R. R. Co. v. Berry, 41 Ark. 09;
Arkansas Midland R'y Co. v. Berry, 41 Ark. 17;
Cairo R. R. Co. v. Parks, 32 Ark. 131;
Memphis R. R. Co. v. Berry, 41 Ark. 436;

These authorities bear out the contention that we claim, but they are sufficiently cited and commented on by the counsel in the case of State v. Stearns.

LET US CONSIDER THE EFFECT OF THE CONSTITUTIONAL AMENDMENT OF 1871.

In 1871 the following provision of the constitution was adopted:

"Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this State or operating its road therein, or which may be hereafter organized, shall, in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property, at and during the time and periods therein specified, pay into the treasury of this State a cer-

tain percentage therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shal', before the same shall take effect or be in force, be submitted to a vote of the people of the State, and be adopted and ratified by a majority of the electors of the State voting at the election at which the same shall be submitted to them."

What was the intention of the legislature and the people in adopting this amendment? We have seen that we have a right to look to the history of legislation ante-dating the adoption of a constitutional or legislative provision, as well as the objects to be attained, in order to properly construe it. It must be remembered that two years previous to the adoption of this amendment the Supreme Court of Minnesota in the Parcher case, 14 Minn., page 297, had held that the contract of commuted taxation was an inviolable contract and could not be changed by the legislature. All of the railroads in Minnesota at that time, with the exception of the Northern Pacific and the St. Paul and Duluth, were operating and paying taxes under territorial charters. It certainly was not the intention of the legislature to ratify these charters, but it was the intention of the people to prohibit the change of these charters by the consent of the railroad company, and the legislature. It was well known at that time that all of the territorial charters providing for a three per cent gross earnings tax had been changed, reducing the tax to a graded system of one, two and three per cent. These changes presumably had been made at the request of the railroad companies, and in order to facilitate their construction. It

cannot be possible that the object in adopting this amendment was to permit the legislature to change the charter of the St. Paul & Duluth and the Northern Pacific, or to reserve the power of amendment.

The language of the act itself does not permit of such a construction. It does not in language reserve the right to amend all or any charters or contracts of taxation. Had it been the object to adopt such a provision as has been adopted in many states, the language should have been clear. It should have provided that all contracts for a system of commuted taxation shall be subject to amendment and repeal by the legislature upon being submitted to the people, and adopted and ratified by a majority vote. The most that is claimed by the Supreme Court in the opinion in the State v. Stearns, is that it inferentially reserves the right to repeal and amend. Where is the language that shows any such inference? It simply says "any law providing for the repeal or amendment of any law," etc., "shall, before the same shall take effect or be enforced, be submitted to the vote of the people."

It will be claimed that this presupposes the right to amend. Not at all. It presupposes the right to amend with the consent of the railroad company, and this is all that was intended.

We had at that time in the state all these railroad charters in clear and specific language granting to the railroad companies a contract for a perpetual system of taxation, providing that their property should be forever thereafter exempt from any other form of taxation, which had been acted

upon by the railroad companies, assumed to be valid by the courts, the executive department of the state and the legislature, found satisfactory to the people, and it was the evident intention to prevent any change without the consent of the electors.

When language is clear and specific, these things, of course, will not be considered in construing an act of the legislature or the provisions of the constitution, but the most claimed here is that there is an inferential power of amendment. The language does not provide for such a reservation. Therefore, it seems to us that these circumstances entirely rebut any such inference.

But, again, following the adoption of this constitutional provision, the legislature in 1873 passed the act in question in this case, providing that the St. Paul, Stillwater & Taylor's Falls Railroad Company should pay one per cent for three years from and after January 1st, 1872; two per cent for seven years after the expiration of said three years, and three per cent thereafter, and providing as follows:

"In consideration of an annual payment of a percentum, as provided in this section, by the St. Paul, Stillwater and Taylor's Falls Railroad Company, the railroad, its appurtenances and appendages, and all other property, estate and effects of said corporation, held or used for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, including the lands granted to said company to aid in the construction of said railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all taxation and from all assessments."

It is strange that if such was the understanding

of the legislature and the people in adopting this amendment, the legislature should immediately pass an act making a perpetual contract for a three per cent taxation upon gross earnings.

Again, by section 3 of the act, it provided that any other railroad company might accept the provisions of this act. Other railroads were organized, constructed their roads, accepted the provisions of the act, and have paid the gross earnings tax ever since said time; notably, the Duluth & Iron Range railroad, which was organized in the year 1875, constructed its road between 1883 and 1886, accepted the provisions of this act, and has ever since paid its taxes under the terms and conditions thereof. A number of other railroads have done the same—the Duluth, Mesaba & Northern Railroad; the Wisconsin, Minnesota & Pacific Railroad Company; the Minneapolis & St. Louis Railroad Company; the Winona & Western Railroad Company.

As was said by Judge Mitchell in State v. Luther, 56 Minn., the legislature undoubtedly thought it had the same right to make such contracts as was possessed by the territorial legislature.

But it may be claimed that this Taylor's Falls act was invalid because it was passed after the constitutional amendment and was not submitted to a vote of the people of the state and ratified by a majority of the electors, but a glance at the constitutional amendment will show that that was unnecessary. The constitutional amendment provides that "any law providing for the repeal or amend-

ment of any law or laws heretofore or hereafter enacted, which provides that any railroad company," etc., "pay into the treasury of this state," etc., "the certain percentage therein mentioned of the gross earnings of such railroad company, now existing or hereafter organized, shall before the same shall take effect, be submitted to a vote of the people," etc.

This was not a law repealing or amending any prior law. All the railroads up to that time had been organized under special charters, and were paying a gross earnings tax under special laws, or under laws applicable to the particular railroad.

It was not in the power of the people by a constitutional amendment to reserve the right to amend or repeal any of the territorial charters or laws providing for a gross earnings tax; but it was in the power of the people to prevent the amendment or repeal of those laws, being contracts, by the mutual consent of the legislature and the railroad companies, and without the vote of the electors. It is therefore to be presumed that the people did not intend to pass a constitutional provision that should have no effect. What they did intend is fairly expressed by the act and was within their power, to-wit, to prevent the alteration of these contracts without the consent of the people. The amendment was not intended as a ratification of any laws passed providing for a gross earnings tax, but to prevent any change in them as contract obligations without the consent of the people of the state. As we have noted, all the laws

then in existence, except the St. Paul & Duluth and the Northern Pacific were passed by the territorial legislature. No question had then been raised as to the validity of any of these laws enacted either before or after the constitution. There was at that time no general law requiring all railroad companies to pay a gross earnings tax. Neither did this act authorize the legislature to enact such a law. It assumed it had the power. Mr. Justice Mitchell, in the case of the State v. Luther, 56 Minn. reviewed the history of the legislation antedating as well as subsequent to the adoption of this amendment, and made an exceedingly strong argument to show that the legislature had the power to enact such statutes in the absence of the constitutional amendment. He referred to various acts passed not only during the territorial legislature, but during the existence of the state prior to 1871, and said:

"This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight."

He then quoted the constitutional provision, and said:

"This language must have been selected and this amendment adopted with reference to the existing legislation and the general legislative policy to which we have referred, and read and construed in that light it amounts to a clear recognition of the validity of existing laws providing for this commuted system of taxation of railroad property and lands, and of legislative power to enact such laws for the future."

Now, we admit that it was passed with refer-

ence to the existing legislation, and with the object as expressed in the body of the amendment, to prevent the legislature from amending and repealing these acts without the consent of the people. His honor, Mr. Justice Mitchell does not claim that it is anything more than a recognition of the validity of existing laws; he does not say that it was passed for the purpose of validating such laws or of authorizing them in the future. This is a part of his argument to show that such laws were valid. A careful reading of his opinion will show that he makes a very strong argument that taking into consideration the legislative construction of our constitutional provision such laws were valid, but he says in any event, this constitutional provision was a necessary recognition of their validity.

Assuming this to be so, (and we have no doubt of the proposition,) it recognized the validity of the Taylor's Falls act as a whole. That act did not merely impose a gross earnings tax, but in consideration of the acceptance of the act and the payment of the tax, made the railroad company forever exempt from any other taxation.

Non constat, that the company would have accepted the act simply providing for the payment of a gross earnings tax without the other provisions.

If the constitutional amendment was an inferential recognition of the validity of such acts, it was only such recognition as the people would give to an act which they already supposed to be valid, and as the act does not reserve the right to amend or repeal such legislation without the consent of

the railroad company, we cannot see why it was not a recognition of the act as a whole, and that such legislation is now valid and a contract beyond the power of the legislature to change.

B.

IT MAY BE CLAIMED THAT THIS TAYLOR'S FALLS ACT DOES NOT CREATE A CONTRACT, BUT IS SIMPLY A TEMPORARY PROVISION FOR TAXATION OF RAILROADS. SUCH WAS THE POSITION TAKEN IN THE STEARNS CASE, AND WE MAY ASSUME THE SAME PROPOSITION WILL BE ASSERTED HERE.

Let us consider this proposition. The act only becomes operative on being accepted by a railroad company by authority of its board of directors, the resolution so accepting it to be filed with the secretary of state.

The Duluth & Iron Range Railroad was organized and constructed after the adoption of this law. It accepted the provisions of this law, and has paid the percentage therein provided since 1884. This was a special law applicable to the St. Paul, Stillwater & Taylor's Falls Railroad Company, but by the third section it was made applicable to any railroad company which should adopt it.

Now, if it was merely a temporary system of taxation, the language of the act would have been different, and it would have been unnecessary to have the railroad company accept it.

Its acceptance made it a contract when the language of the act was broad enough. The language is in substance, that in consideration of the payment of the per centum provided in the section, the railroad and all its lands "shall be and hereby are forever exempt from all taxation and from all assessment."

The act then provides for the payment of the yearly gross earnings percentage. It makes the percentage a lien upon all property of the railroad, and provides for its collection.

Here was not a mere temporary provision for taxation. The language could not be clearer; it was offered to the railroad company and the railroad company accepted it. Its line was constructed upon the faith of it. It has paid taxes for sixteen years under this law. And such laws, in language in many cases identical with this, have been by the Supreme Court of Minnesota from its earliest decision upon this subject, held contracts, and it is now too late to question their validity.

The first act held a contract by the Supreme Court of Minnesota in the Parcher case, will be found on page ... of this brief, Section 18, Chapter 1, Laws of 1857, and it will be noted that the language is not so definite as the Taylor's Falls charter. The act simply provides:

"In consideration of the grants, privileges and franchises herein conferred on the said Minnesota & Pacific Railroad Company the said company shall and will on or before the first day of March in each year, pay into the treasury of the territory or future state, three per centum of the gross earnings of said railroad for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever."

It was urged that this act was not a contract. The court said in the Parcher case, p. 328:

"The charter granted in May, 1857, constituted a contract between the Territory and the Minnesota

and Pacific Railroad Company, one of the terms of which was, that the land granted in aid of the road should be exempt from taxation till sold and conveyed by the company. That the exemption thus conferred is a contract right, a right which a legislature, in the absence of constitutional inhibition, is competent to grant, and inviolable, has been settled in a series of decisions by the Supreme Court of the United States, so that the matter is not open to discussion. State of New Jersey v. Wilson, 7 Cranch, 164; Gordon v. Appeal Tax Court, 3 Howard, 133; Jefferson Branch Bank v. Skelly, 1 Black, 436, and cases cited."

"It is also urged by the defendants that the exemption from taxation was granted to the Minnesota & Pacific Railroad Company without consideration, and that therefore it does not come within the principle of the decisions of the Federal Supreme Court before cited, but it is rather to be classed among the *privilegia favorabilia* spoken of in Christ Church v. Philadelphia, 24 How. 300. We are of opinion that a sufficient consideration is to be found in the agreement of the Company to construct the road and to fulfill the other duties imposed by the charter, and among them to pay three per centum of the gross earnings of the road into the treasury of the Territory or future State. Whether in making the grant the territorial legislature acted wisely, and upon a just estimate of the value of what was conferred, it is unnecessary for us to consider."

The amendment to this charter granted, by the Special Laws of 1865, Chapter 6, to the St. Paul & Pacific Railroad Company, will be found on page ... of this brief; and it will be noted that the Taylor's Falls act was copied from the St. Paul & Pacific act, with a few changes in language to make it applicable.

In the case of the State v. N. P. Ry. Co., 36 Minn.

page 207, the history of which we have given in this brief, the line between Brainerd and Watab (now St. Cloud) and St. Paul was constructed by the Western Railroad Company, organized under the general laws of the state, which company accepted the Taylor's Falls act.

The court said:

"We think the purpose is clearly expressed to subject any railroad company, which, being within the terms of the act, may accept its provisions, to the payment yearly of a percentage graduated with reference to the time of the completion of the first 30 miles of its own line of road; 1 per cent being payable during the first three years after that event, 2 per cent during the next seven years, and 3 per cent thereafter. This is in accordance with a policy which has been so generally adopted with respect to the railroad system of the state, and had been when the act of 1873 was passed, that it affords reason in support of the construction which is by far the most natural from the letter of the act itself."

Again, in the County of Stevens v. St. Paul, Minneapolis & Manitoba Railroad, 36 Minn. 467, referring to the same proposition, the court said:

"We are not disposed to reconsider a question so long settled and so often recognized as settled in this court."

Again, on page 471, referring to the act of 1851, the court said:

"The exemption previously existing was a contract right which the state alone had not the power to impair."

In Traverse County v. St. Paul, Minneapolis & Manitoba Railroad Co., 73 Minn. 417, the court

reiterated the proposition that the contract right of the successor to the Minnesota & Pacific Railroad Company had been settled so many times that the court was not disposed to reconsider the question.

The act creating the Transit Railroad Company, now the Winona & St. Peter Railroad Company, will be found on page .. of this brief, being Special Laws of 1855, Chapter 27, page 84. This act was a little different from the Minnesota & Pacific act in that it provided that the Railroad Company should "pay three per cent upon its gross earnings within sixty days after any portion of the said road shall be operated, and annually thereafter, and the same when paid shall be in lieu of all taxes whatever."

The amendment of 1865, Chapter 10, Special Laws, Section 5, is substantially the same as the Taylor's Falls act.

It is sufficient here to say that all the other grants, railroad charters and laws providing for a commuted system of taxation, are substantially in the same form as the Taylor's Falls act, and have been held by the Supreme Court of Minnesota to be contracts.

See State v. Winona & St. Peter R. R. Co., 21 Minn. 315;

C. M. & St. P. R. R. v. Pfaender, 23 Minn. 217;

City of St. Paul v. St. Paul & Sioux City R. R. Co., 23 Minn. 469;

County of Nobles v. Sioux City R. R. Co., 26 Minn. 294;

State of Minnesota v. St. Paul, Minneapolis & Manitoba R. R. Co., 30 Minn. 311;

County of Hennepin v. St. Paul, Minneapolis & Manitoba R. R. Co., 33 Minn. 534;

County of Ramsey v. C. M. & St. P. R. R. Co., 33 Minn. 537;

County of Stevens v. St. Paul, Minneapolis & Manitoba R. R., 36 Minn. 467;

Minnesota Central R. R. Co. v. Melvern, 21 Minn. 339;

This contract, accepted by the Duluth & Iron Range Railroad Company, is, if anything, stronger than the provisions of Chapter 8, Special Laws of 1865, applicable to the Lake Superior & Mississippi River Railroad Company, and by Chapter 65, Laws of 1870, made applicable to the Northern Pacific Railroad Company. That act simply provides that the "payment of such per cent annually as aforesaid, shall be, and is in full of all taxation and assessment whatever."

The Supreme Court of Minnesota in the Stearns case, did not hold that this was not a contract. The court expressed some doubt about the subject, but in view of the uniform ruling of the Supreme Court of Minnesota it can hardly be said that this is not a perpetual contract, provided the legislature had authority to make such a contract.

This law was made applicable to the Northern Pacific in the same way as the Taylor's Falls act was made applicable to the Duluth & Iron Range, except that the Duluth & Iron Range was required to accept it by authority of its board of directors.

It hardly seems necessary to go beyond the authorities in Minnesota for the construction of this

provision. We do not see how the legislature could have been more specific than when it provided that upon the Duluth & Iron Range accepting the provisions of this act, it should forever thereafter be exempt from any other form of taxation, in consideration of its paying the percentage of its gross earnings therein provided.

The facts in this case and the language of this act easily distinguish it from the authorities cited by the attorney general in the Stearns case.

Tucker v. Ferguson, 22 Wallace, 527. In this case Congress made a grant of lands to aid in the construction of a railroad. The Flint & Pere Marquette Company was organized under the general railroad laws of Michigan. The legislature conferred this grant upon the company, but provided:

"That nothing herein contained shall be so construed as to relinquish the right of the state to any specific tax imposed upon any railroad company within this state."

By the 20th section of the act, page 532, statement of facts, a specific annual tax of one per cent upon the cost of the road, its equipments and appurtenances, was imposed, and it was provided that "it shall be lawful for the legislature of the state in their discretion after ten years, to impose on either or each of said railroad companies, the payment of a further tax upon the gross or total earnings of such road of not exceeding two per cent, which above several taxes shall be in lieu of all other taxes to be imposed within this state."

This act was passed in 1857. In 1859 the legisla-

ture passed an act repealing the 20th section and making the railroad subject to the general tax law of the state, providing for a one per cent tax upon its capital stock, which was a very much smaller tax than the 20th section provided, and making the lands exempt for a period of seven years. The validity of this repeal was not in question. In 1873 the legislature passed a law which made the lands of the railroad companies taxable as other lands were taxed, and provided for a gross earnings tax. As to the seven years exemption of the lands, the court said:

"There is no complaint that this stipulation has been violated," so that, so far as that specific exemption is concerned, it was taken out of the case.

It will be further remembered that in the act granting the lands to the railroad company, the state reserved the right to impose any specific tax upon the railroad company.

Therefore, in this case there was no contract in relation to the lands that was violated.

In 1871, after the lands had been granted to the railroad company, had been accepted and all the conditions of the grant fixed and determined, the legislature voluntarily extended the time of exemption of the lands three years. The court held that this was a mere voluntary extension without consideration. The court said:

"There was no consideration; the company was required to do nothing and did nothing in return."

It was apparent that this was a mere gratuity.

The railroad company was required to perform no additional service; its grant was not changed; no obligation was imposed upon it; it required no acceptance or payments.

So far as the 20th section of the act was concerned, it was not involved in the case, because the court held it did not apply to the lands. The court said:

"The proposition founded upon the twentieth section of the act of the legislature of the 14th of February, 1857, is unsound. There are several answers. We shall state but one of them. That section imposes a tax with reference to the railroad itself. It has no relation to the lands owned by the company not used nor necessary in operating the road. The lands of the class of those here in question doubtless were not present to the mind of the legislature when that section was framed. The language employed cannot receive the comprehensive construction contended for. The subject of taxing the lands of the company had already been dealt with. The seventh section of the act provided that they should not be taxed for seven years from the 1st of September, 1857. It would have been a solecism to exempt them for seven years and in the same act to exempt them without limit of time."

It is therefore perfectly evident that this case is entirely distinguishable from the case at bar. No contract was made and violated by the legislature. The gross earnings tax did not apply to the lands at all. The case is clearly not in point.

The case of West Wisconsin R. R. Co. v. Supervisors, simply followed Tucker v. Ferguson, and any discussion of it is unnecessary.

The case of Bailey v. Maguire, 22 Wallace, 215, is less in point. In that case the Pacific Company

incorporated under the laws of Missouri, was by its charter exempt from any "public charge or tax whatever," for five years from the passage of the act. This would expire in 1856. In 1852, by the consent of the company, the legislature repealed this by amending the charter of the company. This charter so far as necessary to the question at issue is given on pages 217 and 218 of the opinion, and provides in substance that the railroad shall be exempt from taxation until the same is completed and open and in operation, and shall declare a dividend, but by the last proviso this exemption shall not extend longer than two years after the road is completed. It was then provided that it should be subject to "taxation at the rate assessed by the state on other real and personal property of like value."

The act then provided the mode of arriving at the value of the property. It was claimed that this provision exempted it from municipal taxation. It is perfectly evident that there was nothing in the provision that would exempt it from all taxation. The act provided that it should be subject to taxation. It was also perfectly evident that the mode of arriving at the taxation provided for in Section 12, was not a contract. There was no language that the value of its property should be forever arrived at in that manner.

In the case of Salt Co. v. Saginaw, 13 Wallace, 375, there was no language as to the time the bounty should be paid, or how long it should last. The corporations paid the state no consideration whatever for this. As the court said: "It was a

law dictated by public policy, and a general act like a law offering a bounty of fifty cents for the killing of every wolf or destructive animal."

In the case of Railway Company v. Philadelphia, by an ordinance of the city of Philadelphia of 1857, all street railway companies were required to pay thirty dollars per annum license. The railway company was incorporated in 1864, and by its charter it was provided as follows:

"The company shall also pay such license for each car run by said company, as is now paid by other passenger railway companies in the city of Philadelphia."

Other passenger railway companies at that time paid thirty dollars. This was in 1867 increased to fifty dollars per car. It was claimed that this provision was a contract and could not be changed by the legislature. But it was perfectly evident that it could be changed, because the constitution of the state, in force when the act of incorporation was passed, provided that the legislature should have the power to "alter, revoke or annul any charter of the corporation thereafter conferred by or under any special or general law."

This was a complete answer, granting that it was a contract. But it was a mere license or occupation tax. The charter did not provide that it should be forever exempt from any other form of taxation.

In the case of New Orleans City Railway Co. v. New Orleans, 143 U. S. 192, there was absolutely no ground whatever for holding there was any contract. In 1879 the City of New Orleans sold to this

Railroad Company its railroad for $630,000, and the company agreed "annually to pay into the city treasury upon the assessed value of said road and fixtures, the annual tax levied upon real estate, the value of said road and fixtures to be assessed by the usual mode of assessment."

Subsequently the legislature imposed an annual license tax upon the business of operating the said railway. The court held that the agreement to pay taxes was not by any implication an agreement that the city would not impose a license tax.

The case of Railroad Company v. Gaines, 97 U. S. 698, is clearly distinguishable from the case at bar. In that case the charter of the Memphis & Charlestown Railroad Company provided as follows:

"The capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, machinery, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer."

This was passed in 1857, and the exemption would expire in 1877. In 1870, the constitution of Tennessee was adopted, which provided that "all property, real, personal and mixed, shall be taxed, and all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property shall be taxed higher than any other species of the same value."

In 1875 the legislature passed an act providing in substance that each railroad company which should accept the provisions thereof should, for a period of ten years from the first of January, 1875, pay a tax of one-half of one per cent on the gross receipts from all sources, and it was provided that this should be in full of all taxes.

It was further provided that the acceptance of the same should constitute an amendment to the charter. This ten years would expire in 1885. In 1877 the legislature passed the taxation law which repealed the law of 1875. The court held that by reason of the wording of the charter of the Memphis & Charlestown Railroad Company, its property was exempt for twenty years, but not thereafter.

It will be noted that the capital stock was made exempt forever, but the property for only twenty years.

It is perfectly evident that the legislature did not intend the property to be forever exempt. Furthermore, the road had accepted the act of 1875, which was an amendment to its charter, but the court held the act of 1875 unconstitutional under the constitution of Tennessee.

None of these decisions is authoritative upon the question of whether the language of the Taylor's Falls Act or the circumstances under which it was enacted, constitute a contract.

A careful review of the United States authorities will show that the uniform holding of the Federal Court is that such a contract as the one in question

is not a mere gratuitous temporary system of taxation, but a contract.

In 1845 the legislature of Ohio passed a general act authorizing the incorporation of banks. Section 60 of the act provided as follows:

"Each banking company, organized under this act, or accepting thereof, and complying with its provisions, shall, semi-annually, on the days designated in the 59th section for declaring dividends, set off to the state six per centum per annum on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding; *which sum or amount, so set off, shall be in lieu of all taxes to which such company, or the stockholders thereof, are subject.*"

In the case of Diebold v. Ohio Life Insurance & Trust Co., the Supreme Court of Ohio held that this was not a perpetual contract, but could be changed by the legislature; that it was a mere general law for the taxation of banks in lieu of other taxation, but the opinion of the Supreme Court of Ohio was disapproved by the Supreme Court of the United States.

In the case of the State Bank of Ohio v. Knoop, 16 Howard, 369, (Mr. Justice McLean writing the opinion), speaking of the act of 1845, the court said:

"The act of 1845 is general only in the sense that all banking associations were permitted to organize under it, but the act is as special to each bank as if no other institution were incorporated by it. We suppose this cannot be controverted by any one. This view is so clear in itself that no illustration can make it clearer.

"Every valuable privilege given by the charter and which conduced to an acceptance of it and an

organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter."

Then the court said:

"This compact was accepted and on the faith of it fifty banks were organized, which are still in operation. Up to the year 1851,I believe, the banks, the profession and the bench considered this as a contract, and binding upon the state and the banks. For more than thirty-five years this mode of taxing the dividends of banks had been sanctioned in the state of Ohio. With few exceptions the banks were so taxed where any tax on them was imposed."

Again, after quoting from the Dartmouth College case, the court said:

"The contract between a state and an individual is as obligatory as any other contract, and until the state is lost to all sense of justice and propriety, she will scrupulously abide by her contracts; more scrupulously, that she may exact their fulfillment by the opposite contracting party."

Here was a case where the Supreme Court of the United States overruled the Supreme Court of Ohio. The language of this tax provision was contained in a general act. It is not as binding or as specific as the Taylor's Falls act; it, like the Taylor's Falls act, became applicable to a particular corporation when that corporation accepted it, and when such corporation accepted it, it became the contract of that company.

The Supreme Court again reaffirmed this doctrine in the case of Jefferson Branch Bank v. Skelly, 1 Black, 436, and this latter decision has been cited and approved to the present day.

In this case it was urged that the Supreme Court

of the United States should follow the decision of the Supreme Court of Ohio construing its own laws, but the court said:

"It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a state in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a state upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a state, by its authority."

See Pearsall v. Great Northern Railway, 161 U. S., 662.

In Farrington v. Tennessee, 95 U. S. 679, the charter of the Union Flanders Bank of Memphis provided:

"Said company shall pay to the state an annual tax of one-half of one per cent on each share of the capital stock subscribed which shall be in lieu of all other taxes."

This was held to be a contract which could not be changed by the legislature.

In this case this court refused to follow the decision of the Supreme Court of Tennessee.

The case of New Jersey v. Yard, 95 U. S. 104, is exceedingly instructive upon this branch of the case. The charter of the Morris & Essex Railroad Company provided that after the railroad should earn seven per cent on its cost, the corporation

should pay to the treasurer of the state a tax of one-half of one per cent on the cost of said road, to be annually paid thereafter on the first Monday in January of each year, provided that no other tax or impost should be levied or assessed upon the corporation. But this charter also contained a reservation in the legislature of the right to alter, amend or repeal the act whenever it should think proper.

In 1846 a general act was passed, reserving the right to alter, amend or repeal any special charters.

In 1865 by a supplement to the charter of the Morris & Essex Railroad it was authorized to build a branch from Boomton to Patterson. The third section of the act provided as follows:

"Be it enacted, that the tax of one-half of one per cent provided by their said original act of incorporation, to be paid by the said company to the state whenever the net earnings of the said company amount to seven per cent upon the cost of the road, shall be paid at the expiration of one year from the time when the road of said company shall be open and in use to Phillipsburgh, and annually thereafter, which tax shall be in lieu and satisfactio of all other taxation or imposition whatsoever, by or under the authority of this state, or any law thereof: Provided, that this section shall not go into effect or be binding upon the said company until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the secretary of state, shall have signified its assent hereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

This was held to be a perpetual contract which could not be changed by the legislature. The opinion was written by Mr. Justice Miller, and the principal question discussed was whether the legislature, in view of the previous enactments reserving the right to repeal or alter special charters, intended this section to be a contract. The court held that such was the intention of the legislature; and one of the evidences that this was intended to be a contract was the fact that it was required to be accepted by the railroad company.

The court said:

"The legislature was not willing to rest this contract in the usual statutory form alone, depending for its validity as a contract upon some action of the corporation under it to bind it to its terms; but they required of the company a formal written acceptance within sixty days or else it became wholly inoperative. The company duly executed this acceptance. There was, then, the complete, formal, written instrument evidencing this contract, signed by the presiding officers of the two houses of the New Jersey legislature, and the governor, for one party, and the president and secretary and seal of the railroad company, of the other party. It does seem as if the legislative intention was to make a contract in the same manner, and on the same terms of equal obligation, as other contracts are made, and not to pass a statute which it could repeal or amend the day after it was signed by the parties."

* * * * * * *

"Can it be believed that it was intended by either party to this contract that, after it was signed by both parties, one was bound forever, and the other only for a day? That it was intended to be a part of the contract that the state of New Jersey was, at her option, to be bound or not? That there was implied in it, when it was offered to the acceptance of the company, the right on the part of

the legislature to alter or amend it at pleasure? If the state intended to reserve this right, what necessity for asking the company to accept in such formal manner the terms of a contract which the state could at any time make to suit itself?"

The case is strikingly like the case at bar. Previous to the enactment of the Taylor's Falls charter all railroads in the state, were paying a three per cent gross earnings tax under special charters. The St. Paul & Duluth road was paying three per cent under the act applicable to the Lake Superior & Mississippi Railroad Company, and subsequently the Northern Pacific was required to pay the same tax as the St. Paul & Duluth. Thereupon, the legislature provided by the second section of the Taylor's Falls act as follows:

"Any railroad company owning or operating, or which may hereafter own or operate, any line or lines of railroad in this state, may, by resolution of its board of directors, attested by its secretary, and filed with the secretary of state, accept and become subject to the provisions of this act; and in such case the payment of such percentage in lieu of taxes, in accordance therewith, shall commence from and after the first day of March next after the completion of thirty miles of such line hereafter built, or of the entire line, if the same shall be less than thirty miles in length."

As said by Mr. Justice Miller in the New Jersey case, if this was a mere temporary system of taxation, what was the necessity for the acceptance of it by the railroad company?

The legislature had undoubted power to tax the railroads on their gross earnings at that time. This was after the passage of the amendment to the con-

stitution in 1871. In fact, we have seen that the power has never been doubted in this state. It is perfectly evident why the railroad company was required to accept it. Because it was made perpetual; because it was a tax upon state and interstate earnings of the railroads. This act was not a general law for the taxation of all railroad companies; it was special to the St. Paul, Stillwater & Taylor's Falls Railroad Company. As to that company it had the same force and effect as a special charter. As to any other railroad it had to be accepted by the company, and thereupon became a contract.

Whenever the legislature offers either by general or special law an immunity or privilege to a corporation, it is as binding as though it was contained in the charter of the corporation. It is not necessary that it should be by a special act of the legislature. Cooley in his work on Constitutional Limitations, says:

"We have said in another place that citizens have no vested right in the existing general laws of the state which can preclude their amendment or repeal, and that there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. Nevertheless, there may be laws which amount to propositions on the part of the state which, if accepted by individuals, will become binding contracts."

It was evidently the intention of the legislature of Minnesota to provide for railroads accepting this law the same contract relation as had been provided for territorial and other railroads where similar

laws had been passed in relation to those roads. This is evident—because it had been the policy of the state; because the act is in the same language; because the railroad company was required to accept it. If binding upon the railroad company, why should it not be binding upon the state? What was the object of an acceptance if it was only to be made binding upon the corporation?

In view of these facts it seems idle to cite further authority upon the question of this contract.

C.

WAS THE EXEMPTION OF FIVE YEARS, PROVIDED IN THE ACT GRANTING THE LANDS, A VALID EXEMPTION?

This was a grant of swamp lands to aid the Duluth & Iron Range Railroad in constructing a road from Duluth to the iron mines. The grant was made in 1875. We have seen that by the act of congress of March 12, 1860, the swamp land grant to the State of Arkansas was extended to the state of Minnesota. This grant was for the purpose of enabling the state of Arkansas to construct the necessary levies and drains, and to reclaim the swamp and overflowed lands therein. Under Section 2 it was provided:

"On that patent the fee simple to said lands shall vest in the said state of Arkansas subject to the disposal of the legislature thereof, provided, however, that the proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied exclusively, as far as necessary to the purpose of reclaiming said lands by means of the levies and drains aforesaid."

It was held that congress alone had the power to enforce the conditions of the grant; that the state might exercise its discretion as to the disposal of them.

Mills County v. Railroad Co., 107 U. S., 557.

Morrison County v. St. Paul & N. P. R. R., 42 Minn., 451.

These lands were therefore lands subject to be disposed of at the will of the state. It is our claim that the state had a right to make such conditions to its grant of lands to aid in the construction of the Iron Range Road, as it saw fit. The provision of the constitution of Minnesota that all property should be taxed of course did not apply to public property. It did not apply to state lands or state institutions, the state capitol or any public property. Of course, it is not stated in so many words, but it is the natural implication that public property was not to be taxed. That being the case, it logically follows that the state was at liberty to dispose of its lands and public property in the most advantageous way. If it could induce the construction of a railroad into the iron country by a grant of 600,000 acres of its swamp lands that were absolutely valueless to the state without the construction of roads, and of little value anyhow, by making these lands exempt for a term of years until the railroad could be constructed and got in operation, we see no reason why the state was not authorized to do so.

As stated by other counsel, the state could clearly have reserved the title to the land and provided for a conveyance from time to time, until the railroads should desire to sell them to actual purchasers. This would have prevented their being taxed. It has been the common custom and practice in Minnesota and other states to grant state lands to railroad companies in the form of a present grant, but the patents not to be made until the railroad com-

pany had constructed its line or certain portions of it. No claim has ever been made, or could be, that until the lands were patented to the railroad company they were taxable; they have always been held exempt from taxation. The grant in question was *in praesenti* and required an affirmative act of the legislature or the judgment of a court declaring and enforcing a forfeiture.

> Minneapolis & St. Cloud Ry. v. Duluth & Winnipeg Ry .Co., Duluth & Iron Range, Intervenor, 45 Minn. 104.

Again, the legislature might have adopted another means of assisting in the construction of the Iron Range Road. It could have provided for a sale of the land from time to time by state officials, and the payment of the proceeds thereof to the railroad company. This would have made the lands exempt from taxation until sold to actual purchasers. We believe this argument was somewhat urged in the Supreme Court of Minnesota in the Stearns case, and was overruled. The answer the court made to the proposition was that if this was true, the same condition might be attached to the sale of school lands to private individuals. We do not think the one necessarily follows the other. The state in the sale of its school lands, is not engaged in any work of public improvement. It is simply selling its property to private individuals for a purely monetary consideration.

In the construction of the Iron Range Railroad the state was engaged in a public enterprise to

open up a country to settlement and to develop the iron mines. The grant was made in 1875, was extended from time to time, but in spite of all inducements it was seven years before capital could be enlisted to build a road into a country that had theretofore been considered absolutely worthless. We believe that the state has a right in engaging in public improvements, to dispose of its lands in the most advantageous way. The state might be prohibited from making the lands exempt in the hands of a purchaser, but they are not so exempted. They are simply exempted for five years after being conveyed to the railroad company.

The position we take is supported by authority as well as reason. We have seen in all of the territorial grant of lands and franchises to the various railroad companies in Minnesota, that after foreclosure and after they were bid in by the state, they were granted to the railroad companies upon the same conditions as before, to-wit: conditions of commuted taxation. The court held that the state took and held this immunity or privilege as to taxation, not in its sovereign character, but as property like private individuals, and in this capacity it succeeded to the rights, lands and franchises of the company, and that the immunity was appurtenant to and a part of the property.

Now, this is exactly the way it held the swamp lands which it received from the government of the United States. It held the title of the land the same as an individual would, and with the same power to dispose of it, and no one but the government of

the United States could call in question the good faith of the state in carrying out the trust. It was not granting these lands as a sovereign but as a trustee with sovereign power. If it could foreclose and by virtue of the power vested in it by the laws and the constitution of the state, take the title to the territorial land charters and privileges granted to them and grant them after the adoption of the constitution with conditions, limitations and immunity as to taxation, we see no reason why it could not take the land grant made to it by the act of congress, and grant it for public improvements upon the same or like conditions.

But it may be said that the five million loan constitutional provision authorized it to make such a grant. An examination of this provision will not bear out the contention. See Appendix "D." The five million loan constitutional provision simply authorized the state to loan its credit to the land grant railroads, and authorized the state to take as security first mortgage bonds of the railroad, which in case of forfeiture might be sold or the mortgage foreclosed and the property bid in by the state. No provision of this loan constitution authorized the state, after the adoption of the constitution of 1858, to grant to other railroads the lands subject to any conditions, so that when the state bid in these lands, railroad franchises and immunities, it held them substantially in the same manner as it held the swamp land grant made to it by congress.

In exempting the lands for five years the legislature did not exceed its powers any more than it did in granting the lands of the territorial roads to corporations after the adoption of the constitution. The object of the constitutional amendment of 1858 was never considered in this state to prohibit the legislature from granting lands subject to conditions of taxation. We have shown the legislative, executive and judicial construction placed upon these provisions of the constitution in relation to the three per cent gross earnings tax. The same argument applies to the exemption in question. After the adoption of the constitution the legislature repeatedly made grants in aid of railroads, containing limited exemptions as well as commuted systems of taxation.

We believe that this interpretation is a fair and reasonable interpretation of the constitution. The object of the constitutional provision of 1858 was to prohibit the legislature from passing laws exempting private property in the hands of individuals or corporations; not to prohibit the legislature from attaching conditions in granting state property in aid of a quasi public improvement.

Suppose the state desired to borrow money and should issue its bonds bearing two per cent interest, in consideration of which the bonds should not be taxable, as the bonds of the United States are issued. Would the constitutional provision of the state apply to these? Certainly not, because the state would receive sufficient consideration in making its debt non-taxable. But the principal reason

is that the state has a right in borrowing this money as a part of the consideration of the transaction, to make the evidence of the state's promise to repay the money, non-taxable. This has been the policy of congress. Consequently, government bonds are not taxable.

Again, suppose the state had a piece of property which it desired to lease. Would the constitution prohibit its making the lease-hold exempt from taxation in consideration of which the state received a larger rent? We think not.

The position we take has been supported by the decisions of other states.

The case of People v. Auditor General, 7 Mich., 84, was very similar to the case at bar. The lands were granted to aid in the construction of a canal, and stipulating that they should not be taxed for a period of five years. The remission of taxes was challenged as being contrary to the rule of uniformity of taxation provided for in the constitution of Michigan. The court said:

"It is evident from a consideration of these acts that the land was never a part of the public domain of Michigan, either by grant from congress, or by sale to a purchaser, before the passage of the act in question, so that the right of taxation had accrued to the state. It was granted to the state for the specific purpose of being applied, either by sale or appropriation, to the purposes of the construction of the canal. As such, it assumed the character of a fund, to be expended under the direction of the state; and so the legislature evidently regarded it, and the state held such land only as trustee for the accomplishment of that purpose."

"Instead of selling the lands, and appropriating

the avails towards the construction of the canal, the legislature found it desirable, if not necessary, to appropriate the lands themselves. From the course of legislation we may presume that this appropriation of the lands, was found to be insufficient of itself to induce anyone to undertake the work, and that in order to render it sufficient, the state authorized the contract for the remission of the taxes thereon. This authority was given, and the contract executed while the lands were in a condition in which they could not be taxed, and until such right of taxation had accrued to the state, it was not within the scope of either its constitutional or legislative provisions. The state had power to contract with the company to convey the lands after five years, and thus relieve them during that period from taxes, and if it might do this, it is difficult to find a reason why it might not so convey them as to secure the same exemption from taxation. In making this contract the state acted as trustee of the general government; in the law authorizing the contract, it was dealing with the subject of the trust, over which no right of taxation then existed."

In the case of McHenry v. Alford, 168 U. S. 651, the court said:

"The lands are not purely and simply owned or held for sale or other disposition for profit and in no way connected with the use or operation of the railroad, and in regard to them the company is not a landed proprietor on the same footing with any other proprietor of lands."

The court then proceeded to show that these lands were devoted to railroad use, and assisted in the construction of a public enterprise of great value to the government. The court said:

"Surely all these various facts justify a classification of such an entity for taxation by a different method and upon different lines than individuals,

and lands thus situated and owned are in materially different condition from lands absolutely owned by an individual."

As we have shown, they are devoted to a great public enterprise. The granting of these lands to the railroads has developed the industries of the state far beyond the expectations of the public at that time.

Judge Cornell said in 1877, 23 Minn. 469:

"Experience is fast demonstrating the wisdom of this policy and realizing the expectation of its founders."

Respectfully submitted,

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